No. 11911

United States
Court of Appeals
for the Ninth Circuit

CATHERINE O'CONNOR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
SUPPLEMENT

Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

* * * * —Washland—(Tr. page 36)

Q. Actually, your testimony at the prior hearing was that all discussion of gambling during these conferences covered the year 1945, wasn't it, and now your testimony is the conversations covered all those years, 1942, 1943, 1944 and 1945?

Mr. Campbell: Just a minute. That is objected to on two grounds: first, it is argumentative, and secondly, it does not state the record. The record indicates that the witness stated that she was asked to produce the returns for a number of years. She was asked general questions as to her sources of income. She stated in those years she was gambling. On cross-examination counsel has pulled out a question, saying, "You asked her a question as to gambling applying to 1945?" He said, "Yes, it did," which is not inconsistent with his statement as to what the general nature of the examination was. I suggest that his question is argumentative and it is not within the record on which he seeks now to impeach him.

Mr. Crittenden: May I assign as error the argument of counsel which is attempting to get his witness out of a difficult position?

Mr. Campbell: I object to that, if the Court please.

The Court: That statement is unwarranted. Let it go out and let the jury disregard it for any purpose in this case. I will sustain the objection on the ground it is argumentative. You will now proceed.

* * * *

The grand jury charges:

That on or about the 15th day of March, 1943, in the Northern District of California, and within the jurisdiction of this Court, Catherine O'Connor, also known as Catherine N. Jost and Catherine N. Larson, late of San Francisco, who during the calendar year 1942 was married and had no dependants, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by her to the United States of America for the calendar year 1942 by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, a false and fraudulent joint income tax return wherein she stated that her net income for said calendar year was the sum of $777.29 and that no income tax was due and owing thereon, whereas, as she then and there well knew, her net income for the said calendar year computed on the basis of a joint return was the sum of $6,359.47, derived as follows:

Gross Income		
Net profit from bar		$2,785.92
Salaries		1,380.00
Rental Income		303.00
Partnership Income		2,116.05
Total		$6,584.97
Deductions		
Contributions	$152.50	
Interest Paid	73.00	225.50
Net Income		$6,359.47

upon which said net income she owed to the United States of America an income tax of $1,103.46 (26

U.S.C., 145(b); Section 145(b), Internal Revenue Code).

SECOND COUNT

The grand jury further charges:

That on or about the 15th day of March, 1944, in the Northern District of California, and within the jurisdiction of this Court, Catherine O'Connor, also known as Catherine N. Jost and Catherine N. Larson, late of San Francisco, who during the calendar year 1943 was married for six months and head of a family for six months, did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by her to the United States of America for the calendar year 1943 by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, a false and fraudulent income and victory tax return wherein she stated that her net income for said calendar year was the sum of $7,879.28 and that the amount of income and victory tax due and owing thereon was the sum of $1,707.75, whereas, as she then and there well knew, her net income for the said calendar year was the sum of $21,608.91, derived as follows:

Gross Income		
Net Profit from bar		$ 21,694.25
Rental Income		324.66
Total		$ 22,018.91
Deductions		
Contributions	$255.00	
Taxes	155.00	410.00
Net Income		$ 21,608.91

upon which said net income she owed to the United States of America an income and victory tax of $8,038.65. (26 U.S.C., 145(b); Section 145(b), Internal Revenue Code.)

THIRD COUNT

The grand jury further charges:

That on or about the 15th day of March, 1945, in the Northern District of California, and within the jurisdiction of this Court, Catherine O'Connor, also known as Catherine N. Jost and Catherine N. Larson, late of San Francisco, who during the calendar year 1944 was single, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by her to the United States of America for the calendar year 1944 by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, a false and fraudulent income tax return wherein she stated that her net income for said calendar year was the sum of $5,091.98 and that the amount of tax due and owing thereon was the sum of $1,131.67, whereas, as she then and there well knew, her net income for the said calendar year was the sum of $24,530.88, derived as follows:

Gross Income	
Net profit from bar	$ 24,579.05
Rental Income	451.83
Total	$ 25,030.88
Deductions	
Standard Deduction	500.00
Net Income	$ 24,530.88

upon which said net income she owed to the United States of America an income tax of $10,299.15 (26 U.S.C., 145(b); Section 145(b), Internal Revenue Code.)

A True Bill:

....., Foreman.

....., United States Attorney.

MOTION FOR BILL OF PARTICULARS OR IN ALTERNATIVE TO MAKE INDICTMENT MORE CERTAIN

To the Above Entitled Honorable Court:

The defendant Catherine O'Connor having made a demand for a bill of particulars, and a response having been made by the plaintiff attaching photostatic copies of the tax returns requested, and having specified that defendant's husband earned the salary sought to be charged to defendant in 1942 by the indictment in the above-entitled matter; and the Penal Division, Treasury Department having advised defendant's counsel that the "cash" method of accounting and not some other method involving inventories having been used, but having refused to provide the items of gross income and sources or the items of expenses and deductions to make up the item of "net income from bar" set forth in the indictment in each of the counts for each of the years 1942, 1943, and 1944;

The defendant Catherine O'Connor moves for a further bill of particulars to set forth said items requested and refused in her demand for a bill of particulars; and reference is hereby made to her demand filed in the above-entitled matter.

And in the alternative, if such bill of particulars be denied or refused for any reason, said defendant moves that said indictment be made more particular by the setting forth of the various items of gross income giving the various sources, and the items of expense and deduction (showing each item) upon which the "net income from bar" is alleged in each count, for the years 1942 in first count, 1943 in the second count, and 1944 in the third count of said indictment.

Said motion is made upon the indictment, the Demand for Bill of Particulars, the Response filed thereto by the Plaintiff, affidavit of the Defendant for Bill of Particulars, and affidavit of counsel for Defendant for Bill of Particulars, and upon the records and papers on file in the above-entitled matter.

/s/ HYMAN & HYMAN,
/s/ HOWARD B. CRITTENDEN, JR.,
Attorneys for Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR BILL OF PARTICULARS

State of California,
City and County of San Francisco—ss.

Howard B. Crittenden, Jr., being first duly sworn, deposes and says: that he is one of the attorneys for the defendant in the above-entitled matter. That the attorneys for the defendant have held an informal discussion with Mr. Walter Campbell, Chief of the Penal Division of the Treasury Department, Mr. Siegel, and attorney in said division, and with auditors and agents of the Bureau of Internal Revenue relative to the figures involved in the indictment in the above-entitled matter. That a bill of particulars has been delivered providing copies of the returns, stating that the wages were those of the defendant's husband in 1942, and it was stated in said informal conference that the cash method of accounting and not the hybred or any other system using inventories were used in arriving at the alleged amounts set forth in the indictment.

That in the course of said discussion it appeared that the defendant kept and maintained together with other records, a grey book covering the financial transactions of the partnership in which the defendant was a partner, in addition to books and records of the defendant's personal transactions. That said grey book contains the only records of the said partnership; and said partnership had income which the first count of the indictment al-

leges there was income chargeable to the defendant. That said partnership book of account in said grey book is in the possession of said Penal Division of the Treasury Department, Bureau of Internal Revenue, and not in the possession of the defendant. That said book contains the only records of the defendant covering the partnership financial transactions during portions of the year 1942.

That in the course of the said discussion it appeared from statements made by said Chief of the Penal Division, and from statements of the agent of said Treasury Department at said discussion, that there exists during the years 1942, 1943 and 1944, and each of them, financial transactions of the defendant which are allowable deductions of the defendant for income tax purposes, which said financial transactions did not appear in any of the records of the defendant. That placing his information upon said statements, and upon his discussions and interrogations of his client, affiant believes and therefore alleges that there are items, transactions, and expenses of the defendant which do not appear in her books or records, and which by reason of the passage of time are no longer within the knowledge or present recollection of defendant, and which items, transactions or expenses either were handled by agents or servants of the defendant or which the defendant has forgotten. That said items, transactions, and expenses are necessary for the defendant to properly prepare her defense in the above-entitled matter, and can be obtained only by a bill of particulars.

That in one of said informal discussions, it was stated by the said Mr. Campbell and by agents of the United States Treasury present at such discussion, that affiant's books did not include or show various income of the defendant during the years of 1942, 1943 and 1944. That affiant placing his information upon said statements, upon his examination of the books, records, and papers of defendant, and upon his conference with his said client and his interrogation of his client believes and therefore alleges that there are sums of money in each of said years, properly includable as gross income for income tax purposes, not shown by said books and not within the knowledge or present recollections of his client; that affiant does not have information or belief as to the items or extent of said income sufficient to prepare a defense in the above-entitled matter, and the only remedy is to obtain a further bill of particulars.

That in the course of said discussion, it appeared that there was several thousand dollars of difference between the government's alleged figures for the year of 1943 and the defendant's books and records. That by reason of this variance in both the alleged income and the variance in the amount of deductions allowed or allowable or known, it is impossible for defendant and defendant's counsel to prepare a defense to the alleged matter set forth in the indictment.

That the defendant was involved in numerous, complicated and extensive financial transactions during the years 1942, 1943 and 1944, and in 1942

a portion of the year in a partnership with another. That part of said financial transactions are material and part are not material in the issues and proper trial of the above-entitled matter. That unless the items making up the gross income and the items making up the business expenses and deductions are set forth in a bill of particulars, with particularity, the defendant will be unable to properly prepare a defense, know the nature and character of the charges against her, cross-examine witnesses; and a great number of irrelevant figures and computations will be gone into at the trial which cannot but prejudice a jury against the defendant, unduly complicate the issues, confuse the issues, and seriously prejudice the defendant.

That the affiant has used various methods of attempting to arrive at the alleged taxable net income or tax liability attempted to the alleged in the indictment, and in doing so affiant has used all the books, records, papers and information supplied him by his client; and affiant has used the "cash in cash out" system, a "net cash" system, a computation using an extention of cost of merchandise using an approximate markup, a "net worth" system, and a totalling of all money shown to be disbursed by accounting periods. That the personal accountant for defendant, Maurice Hyman and affiant spent the better part of one day attempting to use the various systems to estimate or approximate or to arrive at any basis for the figures alleged by the plaintiff. That all of said methods produced estimates approximating more

closely the figures reported by the defendant as her income subject to tax than the figures alleged by the government as taxable net income or income from business. That affiant is at a loss to know or upon which alleged facts, if any, the plaintiff seeks to arrive at the figures alleged in the indictment as "net profit from bar", or which the gross is alleged to have consisted of, or from which or what source it is claimed, or what deductions or expenses were allowed in arriving at such "net profit from bar".

That affiant is informed by the government officials at said discussion, and believes and therefore alleges that the Treasury Department Agents have arrived at said figures of "net profit from bar" in each of said years 1942, 1943, and 1944 upon figures not wholly obtained from the books or records of defendant, but upon facts which are outside of the knowledge of defendant, or within her personal present recollection, and which were obtained by investigation of records and sources available only to an agent or official of the Bureau of Internal Revenue through its powers in investigation of tax matters; and such records, statements, and evidence are not within the reach, authority or inquiry of the defendant or her counsel for want of said means and access of records, statements and evidence granted such government officials, of third parties.

That it is affiant's opinion as counsel for said defendant, that said defendant cannot safely proceed to trial without the items of the bill of par-

ticulars refused to be supplied by plaintiff, and which affiant must have to properly prepare a defense for his client in the above-entitled matter, to cross-examine witnesses offered by the plaintiff, and for the Court to determine the materiality and relevancy of the tremendous amount of testimony covering the numerous financial transactions that would otherwise be injected into the issues upon a trial.

/s/ HOWARD B. CRITTENDEN, JR.,

Subscribed and sworn to before me this 25th day of August, 1947.

(Seal) E. J. CASEY,
Notary Public in and for the City and County of San Francisco, State of California.

AFFIDAVIT OF CATHERINE O'CONNOR IN SUPPORT OF DEMAND FOR BILL OF PARTICULARS

State of California,
City and County of San Francisco—ss.

Catherine O'Conner, being first duly sworn, deposes and says:

That she is the defendant in the above-entitled proceedings indicted under 26 USCA 145b for the returns she filed for taxable years 1942, 1943, and 1944. That in each count of the indictment it is stated that she received "Gross Income" itemized as various items of net income. That her financial

records and books of account, vouchers and bank statements of those years are such that they approximately support her original returns but there is a great differential between the sums alleged in each year of the indictment as between "net income from bar" and "rental income". That her accountant and the person drafting various tax returns of hers, Mr. Bosserman, have held lengthy conferences with affiant's counsel in the above-entitled matter, and affiant is informed by them and believes and therefore alleges that there appears to be no correlation between the amounts alleged as such items of "net income from bar" and "rental income" in the indictment counts and her records and books of her financial transactions for each of the years covered in said indictments; nor can it be ascertained what sum or sums are sought to be charged as gross receipts or from what sources, which sums of deductions, expenses and costs of business have been allowed or disallowed or in what sum.

That it is necessary for affiant to prepare her defense to the indictment in the above-entitled matter; and it is impossible to do so without advising her said counsel of the facts or the matters charged; and that she does not know and cannot ascertain in what manner or for what amounts and from what sources the indictment seeks to predicate the gross receipts, or how much thereof is from sales of drinks, sales of liquor, music box receipts and other rentals, the items deducted therefrom to arrive at "net income from bar" such as the items of rent, salaries, wages, stock purchases, depreciation of equipment (or the base, period, or

amounts allowed in that figure) or the items of rent sought to be charged to affiant, the depreciation schedules including base, rate, etc., and what items of deduction were allowed or disallowed as taxes, repairs, maintenance, insurance, etc. That she is unable to ascertain what methods or periods of accounting were used in the determinations alleged in the indictment, or the computations to arrive at the sums alleged.

That ordinary tax practice before the Internal Revenue Department involves an assessment with statements of items of deduction disallowed, and items of income sought to be charged, and the reasons therefor. That affiant has not the benefit of any such assessment or a statement of the grounds or computation thereof. That it is necessary that it appear in the bill of particulars by items, for example, some sum for wages for a certain year may appear to be allowed as a deduction, when in fact affiant may well have paid a greater sum. Upon the trial it will be necessary for each employee's wages for each month to be proved, unless the bill of particulars states with certainty which employee's salaries or compensation are allowed and for what sum, as allowable deduction or it appears which employee's wages are disallowed. That the three years covered by the indictment involves a great mass of financial transactions by and on behalf of affiant; and from the indictment she cannot advise her counsel which items are questioned or made the basis of the said three counts, and the public offense therein sought to be stated, or which items were allowable

deductions or which items were disallowed to arrive at the alleged sums, or what income is sought to be charged to affiant in any particular accounting period, or whether actual or constructive receipt is the theory for setting forth such receipt of moneys.

That without the bill of particulars requested in the above-entitled matter, it will be impossible for affiant to advise her said counsel of the factual matter involved in her alleged offense or in her defense, nor will it be possible to prepare a defense nor will it be possible for her counsel to properly cross-examine witnesses brought forth by the prosecution, nor to be able to rebut or test the testimony sought to be produced, nor for the Court to determine the materiality of evidence sought to be introduced. That without such bill of particulars, it will be impossible to conduct a fair or speedy trial of the issues nor to determine the material issues nor to present a clear and adequate defense to said charges. That without such bill of particulars it will be necessary to make judicial proof of every one of the numerous financial transactions made by or on behalf of affiant over a period of three years, 1942 to 1944 inclusive, and it will unduly take the time of the Court, counsel and affiant in such a proceeding.

CATHERINE O'CONNOR.

Subscribed and sworn to before me this 31st day of July, 1947.

(Seal) THOMAS J. O'CONNOR,

Notary Public in and for the City and County of San Francisco, State of California.

* * * * (Tr. page 80)

Mr. Campbell: At this time we are going to offer in evidence Government's Exhibit 14, the ledger which has previously been marked for identification with the same number.

Mr. Crittenden: We will object to anything in the record after the 16th day of July 1942 going into the record as writing not proved, not shown to have been made by the defendant, not shown to have been made in the regular course of business, or that it was a proper or an original entry made by anybody at her instance or request or under her direction, or that it was made by any person who made it—in fact, they haven't even proved who made the entries after the 16th day of July, that the person making them had personal knowledge of the transaction or obtained such knowledge from a report regularly made to him or by some other person employed in the business whose duty it [80] was to make that report in the regular course of business.

The Court: Your objection goes to the foundation that has been laid for the introduction of this book.

Mr. Crittenden: After the 16th day of July 1942. Prior to that date we will stipulate that it was the partnership record, but after that date that is a disputed writing and has no place in the evidence.

The Court: Beginning on July 16?

Mr. Crittenden: That is right.

The Court: What is the answer to that, counsel?

Mr. Campbell: I will lay a further foundation, your Honor.

The Court: Very well.

Mr. Campbell: Q. What did the defendant state as to any entries made after July 15, 1946?

Mr. Crittenden: We have that affidavit here and I am going to object to that question. He has testified those were the statements that were made.

The Court: You may answer.

A. She stated that the entries made after July 15, 1942—

Mr. Campbell: Q. Yes.

A. In the receipts column were not made by her and that she did not know who made them. She could not give any explanation whatsoever for them.

Q. Now, as to the other entries appearing after that date?

A. As to the entries in columns other than receipts, in the paid-out column, she did identify certain other figures after July 16, 1942 as being hers and some of them as being those of her husband at that time, Mr. Jost.

Q. Did she identify any particular ones which you now recall and on what dates?

A. No, I can't recall the particular ones.

Q. Did she designate which ones?

A. She merely pointed them out, yes.

Q. You made no record of that at the time?

A. No, I did not.

Q. I call your attention further to certain obliterations appearing on the page for August, ink

obliterations appearing there over certain figures. Did you observe those obliterations at that time?

A. Yes, I did. As a matter of fact, the obliterations were much more complete originally in this book.

Q. Will you explain that?

A. In order to find out what was underneath all this scratching out, I took a soft eraser and to the best of my ability removed the top scratchings, which were in pencil. Originally it was so covered you couldn't read any of the figures under here, but I did remove by the use of a soft eraser most of the pencil.

Q. There were pencil obliterations on top of the ink obliterations that appear there?

A. Well, I don't know which was first, the pencil obliterations or the ink, but I was able to remove most of the pencil obliterations so I was able to read the figures.

Q. In connection with your examination of any of the books and records of Mrs. O'Connor's, did you observe some more obliterations in appearance to those on any of the records submitted by her?

Mr. Crittenden: We are going to object to any question as to what any other documents were unless they are produced. They are the best evidence of what they contain.

Mr. Campbell: I am asking the preliminary question, if I may first, your Honor. I am laying the foundation with respect to any other documents. I am asking him if he saw any. Then I will ask him what they are and then we will attempt to explain their presence or absence.

Q. Did you observe any similar obliterations on any of the documents which she produced for you? A. Yes, I did.

Q. What was the nature of those documents?

A. They were the check stubs of the taxpayer, Mrs. O'Connor.

Q. Are those check stubs in your possession or to your knowledge in the possession of the Bureau of Internal Revenue at this time?

A. No, they are not in my possession and to my knowledge they are not in the possession of the Bureau of Internal Revenue.

Q. I show you a document dated July 8, 1946 and bearing the signature Catherine O'Connor, and ask you if that was originally produced here from the official files and records of the Intelligence Unit of the Bureau of Internal Revenue.

A. Yes, it was.

Q. Will you state the nature of that document without stating its contents? What type of document is it? A. It is a signed receipt.

Q. That is enough. Thank you.

I am going to offer this in evidence as Government's next in order.

The Court: It may be admitted and marked.

(The receipt referred to was thereupon received in evidence and marked U. S. Exhibit No. 16.)

* * * * (Tr. page 85)

Mr. Campbell: If the Court please, pursuant to the Court's instructions, I have produced here the original of the anonymous letter referred to in the testimony yesterday, which I desire to submit to

the Court. I object, however, to the introduction of the original letter in evidence in that it bears certain handwriting which is possible of identification.

The Court: Pass it up.

(The document referred to was handed to the Court.)

Mr. Campbell: It is the third document of the group, your Honor. There is attached to it certain Bureau memoranda.

The Court: What is before the Court now?

Mr. Campbell: The defendant has asked for the right of inspection of the original document, to which I objected on several grounds: first, that it is a confidential communication, the author of which should be protected, there being certain handwriting on the original document; second, that it is immaterial to the issues here. As to the contents of that document, it is purely hearsay, and while it would be advantageous to the Government to have it in evidence, I am sure it is not the purpose of the defendant to seek inspection of the original document for the purpose of offering it in evidence.

Mr. Crittenden: I will offer it in evidence.

Mr. Campbell: Then the compared copy, the copy which has been prepared from it, is as good as the original, which might disclose the author of it and subject him to possible retaliation. It has long been the policy of the Government and their law enforcement agencies to protect the identity of informers. It is a privileged document.

Mr. Crittenden: Your Honor, the position of the Government and their witness is that that is anonymous and the signature on there is not the proper signature nor the address of the party who wrote it. They have made that investigation. So any objection stating the fact that it would disclose the party from the signature I think is wholly fictitious. Secondly, I think that the evidence is going to show that one of the Government witnesses was the party who actually wrote that, and I will tell your Honor very frankly there were three parties at the time that letter was written who knew that apartment house sold for $17,000: Mrs. O'Connor, Mr. Hyman, her lawyer, who sold it to her, and her accountant. As far as our going into the question of the writing and who wrote or signed it, I am not even going to go into that question, but I think we are entitled to have that writing. It is very material to the defense of this case, and so far as counsel's statement is concerned, we do not intend to put it in evidence, I have the best intention of putting it in evidence and interrogating a number of witnesses about it. I think on the anniversary of Judas's betrayal it is probably fitting that is a very material point, and we are going to have that as one of our issues and one of our defenses in this case.

The Court: What purpose would it serve in this case?

Mr. Crittenden: It is going to show very definitely that this witness for the Government has a motive, which will be shown from its contents—

not the signature, but the contents of the instrument.

The Court: What relation has that to the guilt or innocence of this defendant?

Mr. Crittenden: It is a very material point. The one who told the Internal Revenue Bureau of the bearclaw was the one who wrote this, the one who turned her in, and the accountant the defendant relied on in this matter. It goes to the question of wilfulness. You will remember the great stress the Government placed on this matter, and this is certainly of the most material nature in view of the fact that we are going to show there were only three parties at the time that letter was written who actually knew the sale price of that property was $17,000. There is one (indicating defendant), there is another (indicating Mr. Hyman), and there is the accountant who made up these reports with which she stands charged. Those are Government Exhibits 1, 2, 3 and 4 which she is charged with having filed. It is certainly material from our viewpoint.

Mr. Campbell: I am going to renew my objection and point out the privilege of such documents and suggest to the Court that the Court can seal the document in the event the Court has in mind or does sustain my objection, so if there is any question raised, it can be subsequently passed upon, that is, if the Court is in accord with my objection.

The Court: Is the matter submitted?

Mr. Campbell: Submitted.

Mr. Crittenden: Submitted.

The Court: The objection is sustained, and I will have this document sealed and turn it over to the Clerk so that both sides may urge their point hereafter to this. Proceed.

Mr. Campbell: At this time, your Honor, I wish to offer in evidence Government's Exhibit 14 for identification, it being the gray D.E. ledger.

Mr. Crittenden: That is only for identification?

Mr. Campbell: It is offered in evidence. It has previously been identified.

Mr. Crittenden: Your Honor, we will renew our objection and again state the grounds: It has not been proved since the 16th day of July 1942. We have no objection to the portions prior to that being admitted, but that part subsequent to the 16th day of July 1942 we object to as not being the record of the defendant. It was not shown nor is there any evidence showing it was kept by her in the regular course of business, that the business was of such a character that it is proper or customary to keep such a book, that the entries in the book are either original entries of the transaction or that the person making such entries, if they were made by the defendant, were made at her instance or request, or that the person who made it had personal knowledge of the transaction or obtained such knowledge from a report regularly made to him by some person employed in the business whose duty it was to make the report in the regular course of business. Having failed in that proof, we are putting in the objection on that ground, your Honor, and your Honor knows the

materiality from the prior trial of this case. We consider it an extremely important thing that that be proved if it is hers, and I thought it was proved the last time in the case it was not her writing, but Mr. Campbell is contending it was made by somebody for her in the ordinary course of business.

Mr. Campbell: I might state a full foundation has been laid for the book at this time. The evidence shows that this particular book, through the evidence of Mr. Divers, was kept by the defendant and himself in the regular course of business. The entries after July 16 to the 23rd of August are similar entries to those appearing prior to that date. Furthermore, there is the admission of the defendant, both orally and the evidence of Mr. Krause and in her affidavit that the entries with regard to the disbursements made in the business after the 16th of July are her entries or those of her husband. Some were hers and some were her husband's. I submit that that is sufficient foundation for the introduction of the document in evidence.

Mr. Crittenden: I think counsel has misstated the evidence.

The Court: The Court is aware of what the evidence is. The Court is prepared to rule. The objection is overruled. It is a proper matter to go to the jury.

(The book referred to was thereupon received in evidence and marked U. S. Exhibit No. 14.)

* * * *—Jost—(Tr. page 174)

Q. Now, after the default divorce, did you con-

sult a lawyer about the rights you had to that tavern? A. Yes, sir.

Q. It was a Mr. Edmond J. Hall, wasn't it?

A. That is right.

Q. Did he ask you to sign a pleading and to swear to it before a notary public?

Mr. Campbell: Objected to as immaterial, the legal rights of the parties having been established and determined by a court of competent jurisdiction in this state.

Mr. Crittenden: I think we can show that this man claimed, this lawyer advised him, that he had a right, and I will read it into the record, the verification.

Mr. Campbell: If the Court please, it is not what this man may have thought or believed. It is what the court has determined their rights were as of the time.

Mr. Crittenden: Well, Brown against Brown determined it, and you tried the last case on the basis of that suit, that he didn't have any interest.

The Court: What is this?

Mr. Crittenden: He signed a verified pleading drawn by Mr. Hall entitled "Answer to Complaint." in Jost against Jost:

> "Answering the allegations of paragraph 5 of said complaint, defendant denies that there is no community property as a result of said marriage and in this behalf alleges there is community property consisting of certain stocks of liquor in the tavern business known as Kay's situated at 581 Valencia Street in

San Francisco, State of California, of the approximate value of $9,000. The defendant further alleges—'' that is the material portion.

Mr. Campbell: I call the Court's attention to the file which has been produced here, which shows the document was never filed. The default was entered, his motion to set aside was denied by the court, and the final decree was subsequently entered, which fully determined the property rights of the parties under the very case which counsel now cites and which he previously cited.

The Court: The objection is sustained.

Mr. Crittenden: Let the record show I want to make an offer of proof as to these matters.

The Court: You made your offer of proof. The record discloses it.

* * * *—Shannon—(Tr. page 197)

Mr. Crittenden: Q. Do they have wakes during the daytime at Dugan's?

The Court: We are not concerned with whether they have wakes or not. This is not the issue in this case. Confine yourself to the charge here.

Mr. Crittenden: I am showing the probability of his testimony.

Q. Do you have wakes in the day or in the night time?

The Court: The Court has ruled. Let it go out and let the jury disregard it.

* * * *—Shannon—(Tr. page 203)

Q. Your testimony as to how much there would be, for instance, over $100, that is total cash that was in the drawer, wasn't it?

Mr. Campbell: Just a minute. Let me have that question read.

(Question read.)

Mr. Campbell: I object to that as assuming a fact not in evidence. He has not so testified, if your Honor please.

The Court: The objection is sustained.

* * * *—Shannon—(Tr. page 204)

Q. At that time you drank drinks during the day? A. Yes, sir.

Q. Approximately 20 drinks a day?

Mr. Campbell: Objected to as incompetent, irrelevant and immaterial.

The Court: What is the purpose of the testimony?

Mr. Crittenden: It goes to show the man's condition at the end of his shift as to his memory as to how much money was taken in or how much money there was in the drawer. He has testified to the amount of business there and I want to go to the weight and character of the amount.

Mr. Campbell: You have to know his capacity as well.

Mr. Crittenden: I think the jury would have to determine that.

The Court: Read the question.

(Question read.)

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: Sustained.

Mr. Crittenden: Q. At the time you were working on these shifts to which you have testified you had had by the end of the day 20 drinks?

Mr. Campbell: Same objection. It is immaterial and incompetent.

The Court: Same ruling. The objection is sustained. If he was intoxicated or under the influence of liquor at any time and you are prepared to show it, the Court will allow it.

Q. And by the time you had been on the shift eight hours about how many drinks had you had?

A. Oh, around 20.

Mr. Crittenden: Q. And that was the regular size shots that was poured at the bar?

A. Yes.

Q. And you stuck to bourbon in drinking?

A. Yes, bourbon.

* * * *—(Tr. page 206)

Q. It was under the effect of those 20 drinks you say you could remember the volume of business?

Mr. McMillan: That is a loaded question.

Mr. Campbell: That is objected to as an incompetent question. It is compound and assumes a fact not in evidence.

The Court: Coupled with that, it is clearly argumentative. Let us have the reporter read it.

(Question read.)

The Court: The objection is sustained. Let it go out and let the jury disregard it for any purpose in this case.

* * * *—Bosserman—(Tr. page 222)

Mr. Crittenden: Q. Now, Mr. Bosserman, I ask you if you remember testifying upon the hearing on direct examination, page 85, starting at line 2:

"Q. Did you accept the figures in that regard as being accurate and correct?

"A. Well, no, I did not. Inasmuch as I had not audited Mrs. Jost's books, I did not accept them as being correct. If I would come to something that did not look reasonable, I believe I eliminated it. For instance, there would be parties and so forth, and the thought in my mind was that maybe she could substantiate those by some documentary evidence. If I did not think she could, I just didn't think it reasonable, and probably threw it out, and I may have done her an injustice."

That runs from line 2 to line 11.

A. I made that statement.

Q. Will you examine that?

Mr. Campbell: Well, he stated he made that statement.

The Witness: Yes, I heard you reading that and I made that statement.

Mr. Crittenden: All right.

Q. You threw out a number of deductions she possibly could have taken, didn't you?

A. Yes, where I felt there was no documentary evidence to support it.

Q. You gave the Government the breaks in making out the return, in other words?

Mr. Campbell: Just a minute. I object to the question in that form. That is putting words in the witness's mouth and twisting his previous answer.

The Court: The objection will be sustained.

* * * *—(Tr. page 241)

Q. For which year are you referring, 1943 or 1944?

A. For 1943 and 1944—that last statement, yes, sir.

Q. At none of those times was there anything to put you on notice that these were not true and correct accounts you were working from and you were making a true and correct return from those?

A. You are asking for it. It did not look good.

Q. Did you tell her that? A. No.

* * * * —(Tr. page 266)

Q. I show you page 99, line 19 to line 23.

A. I guess that is correct.

Q. "Mr. Crittenden: Q. At the time you drew up these returns of 1942, 1943, and 1944 was there anything in the returns or the books that you were working from that would tend to lead you to believe that they were not correct?

A. No, there was not."

Did you so testify?

A. If it is there, I did, yes.

Q. Do you want to reconcile that with the testimony that you gave before the noon hour?

A. I don't care to review my own testimony, no.

Mr. Campbell: To what testimony is counsel referring, if the Court please?

The Court: Read the last several questions and answers.

(Record read.)

Mr. Campbell: If the Court please, I distinctly remember the testimony. It was whether or not

he had a conversation after he was hired to keep books of account for her. He said, "Yes, I did. You asked for it. I told her she had accumulated too much wealth for the income tax returns that she had filed." That was at a period sometime after the filing of these returns. I recall that testimony very distinctly.

Mr. Crittenden: The testimony is—

The Court: The jury heard the testimony. Let them determine it. Let us proceed.

Mr. Crittenden: Q. Do you wish to reconcile the two?

Mr. Campbell: I object to that.

The Court: What is the question?

Mr. Crittenden: I will withdraw the question.

Q. Do you wish to explain—

The Court: Explain what?

Mr. Crittenden: The difference between this testimony read and what he gave before.

The Court: That is clearly argumentative. The objection will be sustained to the question.

Mr. Crittenden: May it appear in the record that I am impeaching the party—

The Court: The court has ruled. You proceed with this case.

* * * * —(Tr. page 249)

Q. You said you did not know which book you had gotten, or how you have gotten the figures together on the partnership return, but you must have had some book?

A. That is absolutely right. I don't remember the partnership return. I only remember very, very faintly making it up.

Q. You did not state you had not seen this grey book?

Mr. Campbell: Just a minute. Counsel is putting words in the mouth of the witness.

The Court: Read the question back.

(Question read.)

The Court: The objection will be sustained.

* * * * —(Tr. page 252)

Mr. Campbell: He has read it. I suggest the impeaching question be asked.

Mr. Crittenden: All right.

Q. Did you so testify as follows—

The Court: Q. Just a moment. Did you read that testimony? A. I read it, yes.

Q. Did you give that testimony as recorded there in the transcript?

A. I believe I did, all of that.

Mr. Crittenden: Q. You did give that testimony? A. I believe I did.

Q. You did state that she did state to you then she was surprised to find that it was taxable?

Mr. Campbell: Just a minute. I object to that. That is after her returns were in and it is not impeaching.

Mr. Crittenden: I asked, if your Honor remembers, as to the testimony that took place as to gambling and which he said was after the 1944 return. He stated all he did was to make the remark that gambling was taxable and she made no reply at all.

The Court: Q. At any event, the return was in at that time?

Mr. Crittenden: Yes.

The Court: What is the purpose of this testimony?

Mr. Crittenden: I am showing his testimony on cross examination was not complete and was not true when he said she made no reply.

Mr. Campbell: There is no showing it was the same conversation. That is counsel's conclusion.

Mr. Crittenden: I will read the entire testimony.

Mr. Campbell: I object to counsel reading.

The Court: I will sustain the objection. Reframe your question and develop any fact you wish in this case.

Mr. Crittenden: Q. Do you wish to explain the difference between the testimony you give now and what you stated before?

Mr. Campbell: Just a minute. That's objected to on the ground there has been no indication that there is any difference in his testimony on this occasion or any previous occasion.

Mr. Crittenden: Do you want me to have the reporter read back?

Mr. Campbell: No, that makes no difference.

The Court: The objection will be sustained.

Mr. Crittenden: Q. I will ask you if the next two questions—I will withdraw that question.

Do you remember at the time you testified at the last hearing, starting at page 96, line 6—

Mr. Campbell: Just a minute, please.

The Court: You will have to lay the foundation.

Mr. Campbell: I am going to object. The im-

peaching question must be asked first. I object to it in that form.

The Court: The objection will have to be sustained. Follow the rule.

Mr. Crittenden: Q. Did you make a statement in your testimony at the last hearing as follows:

Mr. Campbell: I interpose my objection, if the Court please.

The Court: Your objection will be sustained.

Mr. Crittenden: If your Honor please, I want to show a prior inconsistent statement and if you want me to show the statement I can do that.

The Court: You will have to lay the foundation to the introduction of that testimony.

Mr. Crittenden: You mean ask him what he has testified to?

The Court: What are you addressing those questions to, and for what purpose?

Mr. Crittenden: To impeach him by prior inconsistent statements.

The Court: Where is the impeachment?

Mr. Crittenden: Q. Mr. Bosserman, is your testimony that nothing was said at any time when you were preparing any of these returns or prior to the time you filed any of these returns as to the income from any of the various machines?

A. No, there was nothing said that I know of.

Q. That is your testimony on the prior part of this examination?

A. I don't remember what I testified to on the prior part of this examination, but it is my testimony now.

Q. I will ask you if you did not testify at the prior hearing—

Mr. Campbell: Will you refer to the page?

Mr. Crittenden: Page 96, line 6.

Mr. Campbell: Just a minute, before you read the question.

The Court: Is this the conversation had in 1945?

Mr. Crittenden: No, this is the testimony he gave at the prior trial.

The Court: I understand that.

Mr. Crittenden: (Reading "When you started to keep her books—"

Mr. Campbell: Just a minute, his impeaching question was laid prior to the filing of this 1944 return, and I submit, again beginning at line 22, page 94, it is shown that the conversation took place the latter part of 1945. There is no impeachment in the question counsel is asking. Counsel is attempting to draw attention to this by reading only a small portion of the question.

The Court: The Court is now prepared to rule. The objection will be sustained.

Mr. Crittenden: May I state the question before the objection is sustained?

The Court: What question?

Mr. Crittenden: I did not state any question yet.

The Court: If it be the fact it was in 1945, it was after these returns were in and filed.

Mr. Crittenden: The question does not refer to 1945.

The Court: I am only accepting counsel's statement for it.

Mr. Crittenden: Maybe I can frame a question and maybe it won't be for 1945.

The Court: Frame your question in any way you wish.

Mr. Crittenden: Q. Did you state at the former trial:

"Q. When you started to keep her books, do you remember talking about the income from the various machines with her?"

Mr. Campbell: I will stipulate he so testified, but such conversation took place in 1945 after he became her accountant. I submit the transcript in the former trial at line 22, page 94, should be read.

The Court: Read the last question.

(Question read.)

The Witness: I started keeping her books at the end of 1945, period. That is ended.

Mr. Crittenden: Q. Did you do any accounting work prior to 1945?

A. That is a matter of record—no.

Q. Not as a matter of record, as a matter of fact? A. As a matter of fact, period.

Mr. Crittenden: May I have him answer the question that I propounded as to page 96, line 6 to line 8?

The Court: There is nothing before the Court, counsel. Proceed.

Mr. Crittenden: May I have a ruling?

The Court: There is nothing before the Court to rule on.

Mr. Crittenden: Do I understand that I have an adverse ruling on the question?

The Court: There is nothing before the Court, counsel. Proceed.

Mr. Crittenden: Will you read the question I asked the witness, and the answer?

(Record read as follows:)

"Q. Did you state at the former trial—

"Q. When you started to keep her books, do you remember talking about the income from the various machines with her?

"A. I started keeping her books at the end of 1945, period. That is ended."

Mr. Campbell: I have already stipulated he so testified.

The Court: In any event, the record may stand as it is. Proceed.

Mr. Crittenden: I am in a peculiar position unless I have a ruling on this question.

The Court: Proceed. There is nothing before the Court to rule on. Proceed to the next question.

Mr. Crittenden: All right.

Q. Was anything said in any of your conversations with the defendant showing her belief that income from the music and other machines were already taxed by the Federal Government?

Mr. Campbell: Just a minute, I am going to object unless those conversations be confined to the period before or at the time the last return here in issue was filed.

The Court: The objection will be sustained.

* * * * —Bosserman—(Tr. page 261)

Q. This is your letter, your signature, is it?

A. That is right.

Mr. Crittenden: I am going to offer this in evidence.

Mr. Campbell: I object to it on the ground that no foundation has been laid. On the face of the documents they are remote, the documents having been written in 1947, relating to self-serving declarations made by the defendant in 1945, and the receipts referred to all being in 1947. I object to it as remote and no foundation laid, and also attempt to introduce self-serving declarations of the defendant made at a time after the completion of the crime, if any, in this case.

Mr. Crittenden: Your Honor, this letter—

Mr. Campbell: I think the letter should be submitted to the court rather than read in the presence of the jury.

Mr. Crittenden: It is to show in the record what it is.

The Court: Just a moment. Read the question.

Mr. Crittenden: I was just offering this in evidence, your Honor.

The Court: What is it?

Mr. Crittenden: It is a letter by Mr. Bosserman to Mr. Hyman dated July 25, 1947, with a statement on it that he had written it sometime ago and forgot to mail it. "I do not know whether it is any good, or not. Cy Bosserman." It is enclosed in an envelope with a postmark of November 17, 1947, and in it he states, "From my observation—"

Mr. Campbell: Pardon me, Mr. Crittenden. I

am going to object to the reading of this letter. The letter purports to have been written on July 28, 1947. It contains certain conclusions and opinions and refers to self-serving declarations made by the defendant in 1945 and in 1947.

The Court: Pass it up.

(The document referred to was thereupon handed to the court.)

Mr. Campbell: I make the further objection that it would be an attempt to invade the province of the jury.

Mr. Crittenden: It is used solely for impeaching this witness. It will go to the weight and veracity that the jury would attach to his testimony.

The Court: What is the purpose of this offer? To prove what?

Mr. Crittenden: I had asked this witness if his client had not disclosed to him that she had not the slightest idea of income tax or what was taxable and what was not, and he said she had made no such disclosure to him. Consequently, I am trying to show there that this man did know that she did not have the slightest idea—and it is another point that is extremely material in our case—that this client of his relied upon his professional services and acted in reliance upon them.

The Court: Do you wish to introduce this letter of July 28, 1947?

Mr. Crittenden: Yes.

The Court: Let the record so show. The court sustains the objection.

Mr. Crittenden: May that be marked for identification?

The Court: Let it be admitted and marked for purposes of identification.

(The document referred to was thereupon marked Defendant's Exhibit C for identification.)

Mr. Crittenden: Q. Did I understand it was your testimony before the noon recess was taken that you were not in the tavern the first time that you called and talked to the defendant and Mrs. O'Connor?

A. I believe I stepped in the door and asked where I could find Mrs. Jost, and they said. "Upstairs." I turned around and immediately went up.

Q. I will ask you to read your testimony on page 90, lines 8 and 9.

A. Line 8?

Q. Line 8 and line 9.

A. "Q. You went into the tavern?

"A. That is right."

Q. You went into the tavern, is that your testimony? A. To find out where she was, yes.

Mr. Campbell: I am going to object to this method. Lines 6 and 7, which are immediately befor that, read as follows:

"Q. Do you remember where it was?

"A. Yes, I do now. It was in her apartment on Valencia.

"Q. You went into the tavern?

"A. That is right."

The implication that counsel would leave here is that the witness is giving testimony that is contradictory.

Mr. Crittenden: That is up to the jury to determine whether it is different testimony. I think it is. I further would like to observe and have the record show that I assign as misconduct the attempt of counsel to argue before the time assigned for argument the questions of materiality of evidence and its weight, and the amount of weight that the jury should attach to it.

The Court: Let the statements of both counsel go out, and let the jury disregard it for any purpose in this case.

* * * * —Bosserman—(Tr. page 232)

Q. And when you went to her place of business you walked to the place of business, didn't you?

A. No, I went upstairs. She was upstairs.

Q. Didn't you talk to her downstairs at any time?

A. At any time—? Yes.

Q. When were you first employed?

A. Subsequently I did, yes.

Q. When was that?

A. I think two or three times in a period of two or three years.

Q. At the time you went in did you see the music machine in there?

A. I didn't notice them.

Q. Did you see the pinball machine or claw machine? A. I didn't notice them.

* * * * —(Tr. page 350)

Mr. Campbell: You may cross-examine.

Mr. Crittenden: If your Honor please, this has caught me by complete surprise. There are a num-

ber of things he has covered on his direct examination in connection with his computations that are much out of line with the former computations and testimony we had. Your Honor will remember—

Mr. Campbell: If your Honor please, I object to this. I think this is highly improper.

Mr. Crittenden: I have to go into those questions.

The Court: You may bring those matters up in the absence of the jury. You may proceed with the cross-examination.

* * * *—Krause—(Tr. 322)

Q. Now, we will go into detail in each of the methods which you have used. With regard to the calendar year 1942, what was the amount your examination disclosed as having been the net taxable income of this defendant?

Mr. Crittenden: May I ask a voir dire question, if your Honor please, as to the man's qualifications on this?

The Court: Very well.

Mr. Crittenden: Q. I understood that Mr. Tormey made all the computations after your first. He made the second and third spread, isn't that correct?

Mr. Campbell: I object to that question. That is not a voir dire question. This man has shown his qualifications. I have no objection to any questions as to this man's qualifications as an accountant.

Mr. Crittenden: He has not made the computations.

Mr. Campbell: He stated he has.

The Court: You may take him over on cross-examination and ask him any questions that you wish.

Mr. Crittenden: Your Honor remembers the testimony at the former trial. Mr. Tormey is the one who made the computations.

The Court: You may develop that on cross-examination.

Mr. Campbell: Q. You made this audit, did you, Mr. Krause?

A. I personally made this examination to which I am testifying.

Q. When did you complete it, Mr. Krause?

A. The audit, here, oh, about a week or two ago.

* * * * —(Tr. page 447)

Mr. Crittenden: May I state to the Court, I asked Mr. Campbell and Mr. Tormey for an opportunity to examine the accounts, as your Honor suggested, during the noon hour, during the two hour recess. Neither of them gave me an opportunity to do it, and I wanted to show in the record that I have not had the opportunity to examine the work sheets and supporting documents for Exhibits 28, 29 and 30, which I intended to do during the noon hour.

The Court: My suggestion was to familiarize both sides with whatever data, whatever evidence was going to be introduced with the hope we wouldn't have to go over it in detail.

Mr. Crittenden: Yes.

The Court: Any statement or account that was not verified or what not; if you wanted to challenge it, that was my thought.

Mr. Crittenden: But I was denied the opportunity to do that, and I asked Mr. Campbell specifically at 12:00 o'clock to do that, and I asked Mr. Tormey and he said, "I can't do it, I will see Mr. Campbell," and he walked out the door and that is the last I saw of it, the last I spoke to them, before the case reconvened.

Mr. Campbell: Well, if the Court please, my understanding was that if counsel complained of any points of difference those things could be gone into. I have had none indicated. I have seen none. On prior occasions we have attempted, as counsel knows, to get together on those things—with absolutely negative results.

Mr. Crittenden: I think we got very positive results, and I wanted an opportunity to examine it, and I was denied that opportunity.

The Court: Well, in any event, there is nothing before the Court and that matter is entirely out.

Mr. Crittenden: May I have an order permitting me to examine those work sheets from which he has testified?

The Court: I issued an order in relation to any matter or writing that was in dispute, that it be available to you. I take it that Mr. Campbell is prepared to do that?

Mr. Campbell: I am, your Honor.

The Court: That is sufficient. Proceed.

Mr. Crittenden: May I see it as soon as the evening recess comes at 4:30?

Mr. Campbell: Well, if counsel will indicate to me where there is any dispute, we will be glad to go into that item. But to go over a three year audit item by item is impossible in the time at our command.

Mr. Crittenden: Well, very definitely in the original dispute—

The Court: There is nothing before this Court at this time. Proceed with this witness.

Mr. Campbell: That is all, Mr. Krause.

Mr. Crittenden: Well, may I have an order that that be turned over into evidence?

The Court: You will have no order, I have gone as far as I could go to give you any permission you wanted from this record. Indicate what item it is that is available or that you want made available to you.

Mr. Crittenden: I would like to have the work sheets, which showed the miscellaneous, those which are deductible, and the items in 1942—

The Court: Where are they?

Mr. Campbell: Mr. Krause, how many items approximately are included in your audit, a rough estimate?

A. Well, that is a little difficult to say. I think there are 40 lines to a sheet and well, it must be thousands at least, your Honor.

Mr. Campbell: And how many columns to a sheet? A. 14 columns to a sheet.

Q. And you have used a 14 column spread?

A. That is correct.

Q. And you have there five bundles of those

sheets, is that correct? A. Three here.

Q. And how long did it take you to go over those items to list them?

A. Over two months.

Q. Over two months' time you have taken at that? A. That is correct.

Mr. Campbell: I think your Honor can see the impossibility of going over item by item.

The Court: I think it would be well to cool off and let some air in the courtroom. I will allow the jury to retire for a recess.

(The jury then retired.)

(The following occurred without the presence of the jury.)

The Court: Now, then, for the purpose of the record.

Mr. Crittenden: For the purpose of the record, I wanted—

The Court: What items do you want?

Mr. Crittenden: Specifically there are two items in here of vast importance to me.

The Court: Yes.

Mr. Crittenden: One is the item showing detail in schedule on each of Government's Exhibits 28, 29 and 30.

The Court: Are those available?

The Witness: Yes, those are item by item listing of those disbursements shown in Mrs. O'Connor's books that were paid by cash. We compared every item in the book with the checks that were issued and those items not covered by checks; therefore, those are cash items.

The Court: Yes.

The Witness: And I listed each particular item regardless of size, 15 cents, 30 cents; so I have all those listed, month by month and totaled up. The total is the figure to which Mr. Crittenden refers.

Mr. Campbell: Q. That refers to some $30,000 or $31,000 worth of items, is that correct?

The Witness: Yes.

Mr. Crittenden: More than that.

Mr. Campbell: That covers $30,000 or $31,000 worth of items. Many of them are of a few cents, some are of several hundreds of dollars.

Mr. Crittenden: Now, then, the fact is this, the Government audit as shown in the prior figures shows that she had $3,000 or $4,000 less for the years '43 and '44 income chargeable to her than these accounts, and I want to go through and find out where the difference is in these, and the second thing I want to do, which the witness has testified he has in there, are the items which he has allowed and disallowed as applying to the various periods.

The Court: Well, we are going to take a recess. You can take the witness down on that table and he will point out any item that you wish to have him point out, so that you will be familiar with it.

Mr. Crittenden: Yes. Now, I want the record to show as well that the matter I wish to go into on this, on cross examination, was—

The Court: There is nothing now before the Court.

Mr. Crittenden: I want the record to show what the nature of my examination was.

The Court: Just a minute. I am conducting this hearing. The jury is absent here. Anything that goes in this record must be in their presence. The purpose of this inquiry was to assist you on any item that you wanted information on.

Mr. Crittenden: That is right.

The Court: Now, any matter that you are going to take up will have to be taken up in the presence of the jury.

Mr. Crittenden: Now, I attempted to make an offer of proof and your Honor precluded me, and I want to draw your Honor's attention to the transcript on December 23, 1947, at page 655, to the end of cross examination—I mean, on direct examination by Mr. Campbell of Mr. Tormey, and Mr. Tormey's statements as to what he did in the course of his work and investigation. And in this, if it was connected with the investigation, which this man was responsible for, and in charge of, and which he directed. And I wanted to go into that, which specifically shows the man's calling with a blonde girl and attempting to rent an apartment. Secondly, the calling at the place of business and the question of whether Mr. Tormey stated to the defendant that she could go to Mexico but that they would bring her back. Further, that he stated to her on leaving that night, after having three drinks, that the defendant would thank him for the report he sent to Washington. Also, the incident when Mr. Tormey sat at the bar drinking

with Mr. O'Connor and then with Mrs. O'Connor, went up to the apartment of Mr. Tormey and visited and saw the pictures. I think it is supremely material, particularly in view of this man's testimoney that he directed and controlled the investigation and the manner in which it was conducted. And I have been precluded from going into any asking or questioning on the line of the conduct of this examination by Mr. Tormey, which was done at the direction and control of this witness.

Mr. Campbell: Those matters, if the Court please, if true, which I sincerely doubt, have no bearing on the issues of this case; and if at all admissible, they would only be admissible for the purpose of impeachment of Mr. Tormey. Mr. Tormey has not as yet, at least, taken the stand in this case. If there was any bias or prejudice on his part, that would possibly be admissible in cross examination. But it certainly is not admissible under the present state of the record, as counsel knows.

The Court: We will take our recess now.

(Recess.)

(Jury reconvened.)

(Tr. page 455)

Mr. Crittenden: If your Honor please, I covered from January to May, 1943 very hastily. I found six items—

The Court: I am not concerned with what you found.

Mr. Crittenden: Very well. There are a number of things I want to prove—

The Court: Just a moment. There is nothing before this court.

Mr. Crittenden: I want to go into this more thoroughly later on.

The Court: You can do what you like later on. The jury is here. Let us proceed with this case.

* * * * —(Tr. page 478)

Wednesday, March 31, 1948,

10:00 O'clock a.m.

The Clerk: United States vs. O'Connor, on trial.

Mr. Campbell: Ready.

Mr. Crittenden: Ready.

The Court: Waive the roll call, stipulating all the jurors are seated in the box. You may proceed.

Mr. Crittenden: If your Honor please, yesterday I asked that the papers used by Mr. Krause, and from which he testified, be produced and put in evidence. I have only seen them yesterday afternoon during the recess. I have not had an opportunity to examine them since then, and I would like to use them in the balance of the case, and I am sure the jury would be interested in them in their deliberations.

The Court: You may proceed. When the matter is presented I will dispose of it.

Mr. Crittenden: I am attempting to present it at this time, a request for that, and I would also like to have an opportunity to examine it, because that is largely the Government's case, and it differs very widely from the former testimony and very widely from the indictment in this case.

Mr. Campbell: I ask that the last statement of counsel be stricken and the jury instructed to disregard it.

The Court: Let it go out and let the jury disregard it. What is before the Court now?

Mr. Crittenden: I am renewing my request that those papers from which Mr. Krause testified on the stand be introduced in evidence.

The Court: Isn't the data already in evidence?

Mr. Crittenden: No.

The Court: Is the data available here in court?

Mr. Campbell: Mr. Krause will be here shortly, your Honor. He is not here yet. I sent him after some additional papers. May I state, if the Court please, that Mr. Krause testified here as to his findings in the matter. Counsel was given every opportunity to cross-examine at length and did so. I see no useful purpose in this request.

The Court: What I had in mind is this: Is the testimony that went in and the data pertaining to it available to counsel?

Mr. Campbell: Yes, it will be available as soon as Mr. Krause is here.

Mr. Crittenden: I certainly want to examine it and I want to put it into evidence.

Mr. Campbell: Are you offering it as your exhibit?

Mr. Crittenden: No, as part of the Government's case on cross-examination.

Mr. Campbell: If counsel desires to offer it in evidence I will have no objection, whatsoever.

Mr. Crittenden: I will offer it under Rule 43 (b) then.

Mr. Campbell: What is that?

Mr. Crittenden: An adverse witness.

Mr. Campbell: That does not apply here in a criminal case.

Mr. Crittenden: Sure it does.

The Court: The data will be available.

* * * * —Krause—(Tr. page 527)

Q. I will show you Defendant's Exhibit F, which are exemplars of writing by Mr. Krause on cross examination. He testified he wrote those words, "Call Int. Rev. Claw Mach." and ask you to examine that.

A. I would like to have some more of Mr. Krause's writing.

Q. In other words, you want something that he had written?

A. When he didn't know it was going to be used in court or for any other reason, just writing.

Mr. Crittenden: Could we have some of his work sheets that he prepared?

Mr. Campbell: You have one right here in evidence. May I have that exemplar of Mrs. O'Connor's writing?

Mr. Crittenden: I said Mr. Krause. No, I would like his work sheet, if he did some accounting work on it. May I have an order that that be produced? It is here in court lying on the desk.

Mr. Campbell: I submit that this expert has in his hands a document which was written in the court room in the presence of the jury. I do not know what more dignified an exhibit he could have.

The Court: What is before the Court?

Mr. Crittenden: A request that the Court order counsel for the prosecution to deliver to this witness for examination purposes all work sheets which are lying on the table there that were prepared by Mr. Krause and testified to by Mr. Krause.

The Court: Let the record show that your request will be denied. Proceed.

* * * * —(Tr. page 531)

Afternoon Session, Wednesday

March 31, 1948, 2:00

The Court: You may proceed.

Mr. Crittenden: If your Honor please, I asked Mr. Campbell again at the end of the morning recess to see those work sheets or to put them in evidence, that is, the ones Mr. Krause testified from, and I still have not seen them. Now, your Honor has indicated that I am entitled to see them.

The Court: To see what?

Mr. Crittenden: Those work sheets Mr. Krause testified from, those papers of account.

Mr. Campbell: I indicated to Mr. Crittenden that if he had any specific figures he wanted to inquire about, we would answer.

Mr. Crittenden: I told you the ones which we wanted, the deductions and how he arrived at the income.

The Court: We will now proceed with this case, gentlemen.

* * * * —(Tr. page 558)

PAUL W. TORMEY,

called as a witness on behalf of defendant; sworn.

The Clerk: Q. Will you state your name?

A. Paul W. Tormey.

Q. T-o-r-m-e-y.

A. Yes.

Mr. Crittenden: I am calling this man—

The Court: Mr. Krause has come in. Do you wish him now?

Mr. Crittenden: I got the names twisted, I am sorry.

I am calling this witness as an adverse witness under Section 43(b) of the Federal Rules.

Mr. Campbell: Now, just a minute. I object to that.

The Court: There is no application. Where is the rule? Have you it available?

Mr. Campbell: Are you referring to the Civil Rules?

Mr. Crittenden: Federal Rules of Procedure.

Mr. Campbell: Yes, Civil Rules.

Mr. Crittenden: Yes, and they are applicable.

Mr. McMillan: You are referring to civil or equity rules?

Mr. Crittenden: Do you have the rules there?

The Clerk: The civil rules?

Mr. Campbell: Yes, that is civil rules that you were referring to, I take it.

(Book handed to Mr. Crittenden by Clerk.)

Mr. Crittenden: Yes, 43(b) (Reading):

"A party may interrogate any unwilling or hostile witness by leading questions. A party mal call an adverse party or an officer, director, or managing agent of a public or private corporation, or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects, as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party, also, and may be cross-examined by the adverse party, also, and may be cross-examined by the adverse party only upon the subject-matter of his examination in chief."

The Court: The jurors may retire to take a recess for a few moments.

(The jury then retired at 2:48 o'clock p.m.)

(The following occurred without the presence of the jury:)

The Court: Now, we may clear this situation up in the absence of the jury.

Mr. Crittenden: My position is this: Mr. Tormey testified in the first trial as the Government's principal witness. Your Honor heard him testify. There were a number of things I am going to have to bring out from him. I cannot if I call him vouch for his testimony; and consequently the Government has not called him, as I had expected them to, and therefore when I put him on, I have to

bring out these facts and present it properly, present him, and I imagine his testimony will be much the same as it was in the first hearing.

Mr. Campbell: Now, if the Court please, I do not admit, in the first place, that this civil rule has an application as such to a criminal proceeding. And in the first place, Mr. Tormey is not an adverse party. That is clear. This is a criminal case brought in the name of the United States of America and Mr. Tormey is not a party to the proceeding. So that that portion of this rule, if the rule is applicable, would not apply. There has been no showing here whatsoever that this man is a hostile witness. As a matter of fact, his demeanor on the stand in the last trial indicated an effort at fairness and candor on his part. Well, now, Mr. Crittenden! He demonstrated candor and fairness on his part, so far as the defendant in this case is concerned. If the type question which I anticipate, which counsel intends to ask here—I don't presume or, may I inquire of counsel if he intends to go into the accounting testimony or if he intends to go into certain extraneous matters to which previous effort has been directed?

Mr. Crittenden: Both, both.

Mr. Campbell: Certainly this man cannot be put on the stand simply for impeaching purposes. Particularly with acts, if they occurred, which occurred long after the crime in this case, if any was committed. Furthermore, I do concede that there are cases in the Federal courts that hold that the court may, in its discretion, permit a witness

to be called and cross-examined without the party calling him vouching for him in any way, in which case the witness called is a court's witness. However, that is very seldom invoked, and in very unusual circumstances. Here there has been no showing, as a matter of fact, as I pointed out, it has been shown during the trial of the previous case that there has not been demonstrated any hostility by this witness toward the defendant. Now, if such should occur during the course of the examination, counsel may make application at that time, but until that time this witness, if placed on the stand, is his witness, called by him as announced by him prior to the recess.

The Court: I will adopt that procedure, namely, if this record indicates that he is a hostile witness, then we will take the position of taking him on as the court will rule. That will give you full opportunity to examine this witness.

Mr. Crittenden: I will assume to prove, as I did last time, I will prove how hostile he will be.

The Court: I can't anticipate what he will do. That is as near an interpretation of the rules as I am able to determine at this time, and that will be the ruling of the court. We will take a recess now.

(Recess.)

* * * * —(Tr. page 580)

Q. Were you present at all conferences with the defendant from—I should say at all conferences held between her and the Intelligence Unit from

and after your employment in this Intelligence Unit, or were there conferences?

A. So far as I know, I was at all the formal statements after December of '45, yes, sir.

Q. And after December of 1945 you made all of the investigation that was made? A. No.

Q. Somebody else did?

A. Well, as I have explained, Mr. Krause was doing certain matters, the deputy collectors were doing certain matters.

Q. This is your first case that you have been employed in by yourself, isn't it?

A. That is correct.

Q. And how many times did you see the defendant from and after your undertaking this case?

Mr. Campbell: Objected to as immaterial, if the Court please. After all, this is the defendant's witness. That has no materiality.

Mr. Crittenden: I am going to show what he did in this investigation. That is what I am leading up to.

The Court: I will sustain the objection.

Mr. Crittenden: Q. Did you go out to the defendant's place of business at any time?

Mr. Campbell: Objected to as immaterial.

The Court: Objection will be sustained.

Mr. Crittenden: Q. In the course of the investigation, did you go to the defendant's—did you talk to the defendant?

Mr. Campbell: Objected to as immaterial.

The Court: I will allow the question.

Mr. Campbell: It is also incompetent.

The Court: Did he talk to her? I will allow the question.

A. Yes, Mr. Crittenden.

Mr. Crittenden: Q. Now, will you relate to me the first time that you talked to her in the course of an investigation?

Mr. Campbell: Objected to as incompetent, if the Court please.

The Court: Incompetent in what respect?

Mr. Campbell: Well, Mr. Tormey is appearing here as the defendant's witness. It is an attempt to put in some self-serving declarations of the defendant. They are not admissible in this matter and I object to the conversation.

The Court: On that ground I will sustain the objection.

Mr. Crittenden: Do I take it as your Honor's statement that any—

The Court: The Court has ruled and you have a record here. We will have to proceed.

Mr. Crittenden: All right.

Q. In the course of your employment and investigation, did you have occasion to go out to the defendant's place of business subsequent to July of '46?

Mr. Campbell: Objected to as—

Mr. Crittenden: It may have been the fall of '46 or early spring of '47, January or February, 1947.

Mr. Campbell: Objected to as incompetent and subsequent to any date of the crime alleged to have been committed here.

The Court: I will sustain the objection.

Mr. Crittenden: Your Honor, I want to show under Rule 43(c), I want to show what the man did, as shown in the transcript starting with page 655 in Volume 7 on December 3, 1947. Specifically, I will show you the testimony, asked by Mr. Campbell of this witness:

"Q. —"

Mr. Campbell: Well, now, just a minute. If this is for any purpose of impeachment, the counsel can not impeach his own witness. I further submit that the offer of proof and the reading of a record of a prior case, the transcript of a prior record, has no place in this proceeding.

Mr. Crittenden: I will show the Court Rule 43 (c).

The Court: Very well.

Mr. Crittenden: (Reading).

> "In an action tried by a jury, if an objection to a question . . ."

The Court: Just a minute. The Court is now prepared to rule. You have a record. I will sustain the objection.

Mr. Crittenden: Under Rule 43(c), which I am going to read, "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the Court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness."

Specifically, I want to show that he would testify as follows—

Mr. Campbell: Now I am going to object to

this, if the Court please. The Court has overruled an offer of proof.

The Court: I trust that you will try to comply with the ruling of the Court. I am usually able to get along pretty well under circumstances such as this without very much difficulty—under circumstances not only of this kind but all others. I allow the widest latitude in every case. You have a record in this case. If I am in error, you can take advantage of it.

Mr. Crittenden: Under Rule 43(c) I am required to do what I am here attempting to do. The language of it is very clear. I will show you two Supreme Court cases and one Circuit Court case in this Circuit.

The Court: You frame your questions and I will rule on them and that way you will have a record.

Mr. Crittenden: Q. Mr. Tormey do you remember being called to the stand by Mr. Campbell in the prior case on December 3, 1947?

A. I know that I was called to the stand. I can't recall the date at this time.

Q. Do you remember Mr. Campbell asking you some questions about going out to the defendant's place of business? A. Yes.

Q. Do you remember the instance to which they referred? A. No.

Q. Do you remember the incidents when you went out with a blonde girl to rent an apartment, in the testimony that you gave on direct examination asked by Mr. Campbell?

Mr. Campbell: I am going to object, if the Court please; first, this is an attempt to impeach his own witness. Further, I call the attention of the Court to the fact that counsel has persisted in this line of questioning despite the rulings of the Court.

The Court: The objection will be sustained.

Mr. Crittenden: Q. Do you recall testifying as to a time that you went out there to the defendant's place of business?

Mr. Campbell: Same objection, if the Court, please.

The Court: The objection will be sustained.

Mr. Crittenden: Q. Do you remember the testimony you gave relative to the time you brought a blonde girl up to the defendant's apartment?

Mr. Campbell: I am going to make the same objection, if the Court please.

The Court: The objection is sustained and at this time I admonish the jury that this blonde girl that reference is made to, they will disregard that. It may go out and the jury will disregard it for any purpose of this case. You may proceed.

Mr. Crittenden: Now, I understand from your Honor's statement in chambers after the last trial that I was to ask questions until it was thoroughly established that a valuable right has been denied me, and in that suggestion I am going to continue to ask these questions.

The Court: Now, you will desist with the order of the Court. That is clear to you, isn't it? You see, I am responsible for the conduct of the trial of

this case in this court. You have a record here to protect you in the event that you determine that I have denied you any of your legal rights.

Mr. Crittenden: Well, I have to show that under Rule 43(c), what I intend to prove.

The Court: The Court has ruled. You have a record.

Mr. Crittenden: May I have the record show that I stated that I intended to prove that in 1946—

The Court: I admonish you at various times that what you propose to prove we are not here concerned with. You attempt to prove it and I will rule.

Mr. Crittenden: May I have the rules of the Court, 43(c)?

The Court: Now, for the purpose of the evidence, it is not necessary to read the rule. You can indicate.

Mr. Crittenden: May I point out to your Honor what I am trying to do so that I can have this record to show that I am doing what this rule tells me to do?

The Court: The number of the rule is sufficient for the purpose of the record.

Mr. Crittenden: Well, then, under that rule, I am required to make my statement of what I intend to offer, an offer of what I expect to prove by the answers of the witness.

The Court: There is nothing before the Court. Frame your question and I will rule on it.

Mr. Crittenden: All right.

Q. Do you remember the time you discussed renting an apartment from the defendant?

Mr. Campbell: I object to that as immaterial and an attempt to impeach his own witness.

The Court: Objection sustained.

Mr. Crittenden: Under Rule 43(c) I wish to show that this witness went to the place of business, spoke first to the defendant's sister and later to the sister herself, and then discussing the renting of an apartment—

The Court: Now, you will desist from any further comment in relation to that matter. The Court sustained an objection to it.

Mr. Crittenden: Pardon me just a minute, your Honor.

The Court: It is now time for the jury to retire. You may be excused until tomorrow morning at 10:00 o'clock. The jurors may be excused.

(The jury retired at 3:59 p.m.)

(The following then occurred without the presence of the jury:)

Mr. Crittenden: I want to draw your Honor's attention to the decision in the case of Sacramento Suburban Fruit Lands Company v. Soderman in the Ninth Circuit, reported in 36 Fed. 2nd 934, in which the Court points out that if a witness is asked if he knew the value of Minnesota property and the Court erroneously sustained the objection —but the report does not indicate what was expected to be proven, and the answer might prove unfavorable to the appellant, and consequently the error is not presented on the record unless the lawyer presents and states under Rule 43(c) the particular substance of the testimony.

I want to point out further to your Honor the decision of Herencia v. Guzman in 219 U. S. 44, 31 Supreme Court 135, and 55 Law Edition 81; in which, being an action for negligence, the testimony of a witness, physician, was excluded. The Court held that it could not set aside a judgment, because of a ruling on the evidence, where it does not appear that the evidence, what evidence the physician expected to give.

And further on, the case of Scotland County v. Hill, 112 U. S. 183, 5 Supreme Court 93, 28 Lawyers Edition 692, which was a proceeding in equity by a taxpayer to test the validity of stock subscriptions to a railroad company and the power of the County Court to bind the County to pay the bonds. The Court held that error can be assigned in a Court on an exception to exclusion of evidence on oral offer to prove facts; although the record does not show the witness was actually called to the stand to give the evidence or anyone was present to be called for that purpose.

And I want to come within the direct rule of those cases in protecting my record here. I am required, as I understand, by the rules and the decisions of the courts to do that. In all due respect to your Honor, I must protect the rights of my client.

The Court: You have a record now.

Mr. Crittenden: I want to show that this witness, while in charge of the investigation, and which he testified in the former trial was in the course of an investigation, went with a blonde

girl to the apartment house of the defendant O'Connor, that he went upstairs with this girl and that she undertook to rent the apartment from the parties; that there was a disagreement and this man did not think the rent was proper; and furthermore, that he contends that the furniture was included in the rental; and that they went downstairs and left, he claiming that the husband of the girl waited outside in the automobile; that he was on his day off on that particular day and that he left them to take a taxi elsewhere. We can prove by testimony that there were other circumstances, including the statement at the time that the girl did not think the bedroom in the apartment was sufficiently private. I also wish to go into the time that this defendant was at the bar engaged in her business and Mr. Tormey came to the bar and asked to talk to her, had some drinks, and when he left, in the presence of her, in the presence of one of the witnesses which we called for last time, and her sister, made certain statements. One was the question which the witness will deny, that he told them that they could go to Mexico but if they did they would be brought back. Also at the time of leaving, in the presence of the defendant and her sister, stated that the defendant would thank the witness for the report he sent to Washington in the case he was investigating. And I will show further that this man came into the bar, had some free drinks, talked to the defendant's then husband, Mr. O'Connor; that they went to his apartment and visited and that some

drinks were had, although I understand it is this man's position that Mr. O'Connor did not have anything but Coca-Cola; that he showed pictures of his war experiences or where he had been during the war to the parties, invited them to return some time when his wife was there. Now, that is the nature of the testimony I want to go into in this case, your Honor.

The Court: And the purpose of that testimony is what? What is the purpose of it?

Mr. Crittenden: The purpose is to show the nature and the character of this investigation, how it started, how it was based, upon what motive, not only of this witness making his reports on which the prosecution was carried on and which was discussed at length by a witness of the Government as to how it was reviewed, but also—

The Court: The motive—what did you have in mind when you indicated "motive"? Motive for what?

Mr. Crittenden: Well, I should say that the least that would be said of the conduct of this witness was that it was reprehensible and vicious and it would certainly show the nature and the extent of the investigation and what was done and what was before the reviewing authorities of the Penal Division of the Treasury Office; and again when it was reviewed at the Justice Department, which was made quite an issue and gone into by Mr. Campbell on examination of his own witness. And I also think that it would show the weight and character that should be attached to Mr.

Krause's testimony, who was in charge of this investigation when these things were being done by a person under his direction and control, and for whom he was responsible and would undoubtedly influence the facts, in weighing his testimony.

The Court: I will hear from the Government, for the purpose of the record.

Mr. Campbell: If the Court please, in the first place, the civil rule to which counsel alluded, I understand is expressly precluded from application to criminal cases. However, even though it were applicable, it certainly has no provision here. The defendant has seen fit to call Mr. Tormey as her witness. Now, with this testimony to which he has referred and which, from counsel's statement, was made subsequent to any acts on the part of the defendant, they would only be admissible if they were for the purpose of showing bias and prejudice on the part of this witness, whom they have called —and therefore they would be impeaching him. The rule is too well known that one can not impeach their own witness unless they are taken by surprise by his testimony, in which case they can show prior contradictory statements. There has been no showing of prior contradictory statements, and if there were, they could not impeach his testimony by this type of showing. They would have to show prior contradictory statements as to the accounting evidence which he has given here. The testimony is clearly inadmissible. It has nothing whatever to do with the facts of the case, although counsel has seen fit throughout the trial to make

insinuations concerning it. Your Honor having ruled on the matter, and I hope that your Honor will again rule that the evidence is clearly inadmissible, I think counsel should be admonished from attempting time and again in the presence of the jury to interject such an issue here.

The Court: Well, I want him to have a whole record on that.

Mr. Campbell: I understand, your Honor.

The Court: So for the purpose of this hearing, the Court is now prepared to rule, and for the purpose of the record, so that you will have a record, I will sustain the objection.

Mr. Crittenden: I take it by your Honor's ruling, so that I may be bound thereby, that any further inquiry as to the manner or nature or character of conducting this investigation is not admissible and would not be proper for me to go into that on the examination?

Mr. Campbell: We don't ask for such a ruling.

The Court: No, I can't anticipate what you are thinking about or what you have in your mind. We will have to proceed orderly in accordance with the rules.

Mr. Crittenden: Well, the point is this: Your Honor has heard the testimony in the prior case where I put on both, with the three witnesses as to how this investigation was conducted, and the statements of the investigator in the Court as to his investigation. I have the best of intentions of putting on and giving the jury the facts of the case, which are material to show how this material was conducted.

The Court: Well, I suppose if there were any criticism at all, it should be directed at the Court. I allowed, as I try to allow in every case, wide latitude; and I am free to say that I went beyond any reasonable bounds when I permitted you to do that. There is nothing unusual about that, for I do it repeatedly. You will have a full opportunity to be heard when we are through with this record.

Mr. Crittenden: Yes, but if your Honor—

The Court: I shall bind you to nothing. We have to confine ourselves to the rules.

Mr. Crittenden: Well, if your Honor takes the position that these matters which I put on at length in the last trial are not admissible, I don't want to go into the questioning and presenting of the witnesses and interrogating them on the stand. And on the other hand,—

The Court: I don't think that any of these visits to the apartment with the hope of renting an apartment have any relation at all to the issues involved in this case.

Mr. Crittenden: Well, if your Honor's ruling on the question—

The Court: Is that sufficient record for you?

Mr. Crittenden: That is sufficient.

The Court: Very well.

Mr. Crittenden: Now, it is—

The Court: It is now time for adjournment.

Mr. Crittenden: May I have some kind of an order to be able to examine the records of Mr. Krause from which he testified?

The Court: My experience here has been, for

some period of time, that you would have no difficulty in getting any information you wish from the Government, for I have never knowingly known of any case where they didn't give any information within any reasonable bounds with relation to what they have. I trust that is true here. I have no reason to believe it is not true.

Mr. Crittenden: Your Honor, it is not true in this case.

The Court: Well, you will have to point out what you wish.

Mr. Crittenden: I wish to have the statement of the work sheets which show the disallowed items, those which were not given as a deduction to which Mr. Krause testified he had marked in his work sheets; and I also want to find out the papers and sheets on which he computed this far greater sum than Mr. Tormey.

The Court: We are concerned here with the ultimate fact, whatever it might be.

Mr. Crittenden: I want those—

The Court: If we went into every work sheet making up these various accounts, why, I am afraid this jury would be quite uneasy about it. It would take weeks. I don't see how it could be done.

Mr. Crittenden: It is obvious that this man's testimony, Mr. Krause's testimony, is wrong. It is wrong even by his own assistant's account as to the gross receipts. And the method of accounting that was used was pointed out by this accountant to be probably subject to overstatement.

The Court: Well, I can't stop you from think-

ing. You can think as you please, and I am not going to interfere with you. But I will give you a record on anything you want here and there is now nothing before this Court. So we will now conclude for the day.

(Thereupon an adjournment was taken until tomorrow, Thursday, April 1, 1948, at 10:00 o'clock a.m.)

* * * * —Tormey—(Tr. page 598)

Mr. Crittenden: Q. I will have to take it in this way. I will have to take each of these items and have you show me where you entered them in the book. For instance, that music, 15 cents, under the February miscellaneous column, will you show me where that is.

A. I can do it. It might take me some time to find it.

Mr. Crittenden: I will state to the Court, to save time on this, that we have gone over these things and he did carry them by month.

Mr. Campbell: I suggest counsel ask the direct question, if the Court please. This man here is his witness and not subject to cross examination by counsel.

Mr. Crittenden: He is slightly hostile when he answers differently than he did before.

Mr. Campbell: I object to that and ask the Court to instruct the jury to disregard it.

The Court: It may go out and the jury is instructed to disregard it.

What 15 cent item do you have in mind? What is the importance of it?

Mr. Crittenden: I want to show, your Honor, in these columns as he took them off he took them off as totals, and we can't reconcile them as to the figures at all.

Mr. Campbell: Objected to as an attempt to impeach his own witness.

Mr. Crittenden: I want to show the type of computation that the Government has made.

Mr. Campbell: These are computations, if the Court please, that are now being advanced by the defendant as being the correct computations.

Mr. Crittenden: I am not advancing them as the correct computations. I am trying to show just what the Government acted on, the basis of their report.

Mr. Campbell: Counsel has seen fit to make this man his own witness and I submit he is bound by his testimony.

Mr. Crittenden: I had to because you failed to call him. You had him on the stand at the last trial.

The Court: We will get through with this 15 cent item and then the Court will be prepared to rule.

Mr. Crittenden: Very well.

The Witness: The item of 15 cents to which Mr. Crittenden has directed my attention appears in the defendant's book in column 10 labeled "Miscellaneous," bearing a total of $13.95 for the entire column. The addition of this column was corrected to a total of $13.98 and allowed in my audit as general expense.

Q. Will you show me where that item of 15 cents is entered in your book?

A. Yes, I just testified it was allowed as general expense, the total amount of $13.98.

Mr. Crittenden: The witness is pointing to a line of a total of $13.98 on his work sheet.

Q. There is no breakdown, then, on these various items, is there?

A. Yes, it is identified on my work sheets as appearing in Taxpayer's miscellaneous column 10 of the photostat.

Q. Let us take the month of March. We will take the first item up here, Bosserman filing income papers, $45. Will you find that for me?

Mr. Campbell: Objected to, if the Court please, as immaterial, incompetent, and an attempt to impeach his own witness.

The Court: The objection is sustained.

Mr. Crittenden: May I have him show me where the item of paper for door, $1.36 is?

Mr. Campbell: Objected to as incompetent and an attempt to impeach his own witness.

The Court: Let him show it if there is any question about it at all.

Mr. Crittenden: Q. It says "paper for door, March 2, $1.36."

A. The item labeled "paper for door" in the amount of $1.36, appearing in column 10 of the taxpayer's record for the month of March 1943, appears in a column which I have correctly totaled to the sum of $331.76 and is charged as personal drawings of the taxpayer, every item in that ac-

count, for the purpose of my audit having been considered a non-deductible expense.

Q. You retotaled these to $331?

A. That is the figure which I entered in my work sheet.

* * * *—Tormey—(Tr. page 605)

Q. Supposing I add these together and see what they come out to.

Mr. Campbell: Objected to as an attempt to impeach his own witness and certainly developing no issue with respect to this case.

The Court: The objection is sustained.

Mr. Crittenden: Your Honor, the mathematics in this case will show that there has been terrible mistakes in mathematics, and the basis of the Government's case—

Q. The "paper for door, $1.36" is included, according to your testimony, in the total of $331.76?

Mr. Campbell: Objected to as an attempt to impeach his own witness.

The Court: The objection is sustained.

Mr. Crittenden: I want to show the type and nature of the Government's computations on which they have based their case. $346.30 is the total of this column and I want to show the arithmetic is entirely wrong, that the man has taken totals and has not used them properly.

Mr. Campbell: I ask that that be stricken.

The Court: Let the remarks of counsel go out and let the jury disregard them for any purpose in this case. We will proceed with this case.

Mr. Crittenden: Q. May I have that arithmetic total? You are an accountant, aren't you?

A. I have so qualified.

Q. Will you give the arithmetic total of these figures in this column 10 of March 1943?

The Court: Have you got them?

A. No, I don't have them.

Mr. Campbell: Objected to.

The Court: In any event, he hasn't got them.

Mr. Crittenden: We can get them. It is a simple arithmetic problem.

The Court: Take that book down and proceed with this case. Now, I warn you, so you won't be taken by surprise. You obey the order of the Court.

Mr. Crittenden: I have always obeyed the order of the Court.

The Court: I will see to it that you do. I only say that kindly to you at this time. It has never at any time become necessary for this Court to punish anybody because they did not obey the Court. I have a duty here. There is a jury sitting in this box, and I want your client and everyone else who is charged with an offense coming into this court, to have a full opportunity to present their matters to the jury, but they must do it within the rules, and you are familiar with the rules.

Mr. Crittenden: Yes, your Honor.

The Court: Now, you proceed, and that will be sufficient for all purposes of this case. You now proceed legally.

Mr. Crittenden: Q. May I have the items of January 1943 that are shown in this column No. 10? Show me where they are entered in your work sheet.

Mr. Campbell: Objected to as immaterial.

The Court: The objection will be sustained.

Mr. Crittenden: Q. May I have the item of "Fix chair and globes, $3.30," appearing on January 9, 1943.

Mr. Campbell: Objected to as incompetent.

The Court: The objection is sustained.

Mr. Crittenden: Will you show me where you have entered and how you have carried the item of $15 under miscellaneous on the 15th day of January 1943 that is marked "Mops, brooms, paints, et cetera."

Mr. Campbell: Same objection; further, that is an attempt to impeach his own witness.

The Court: Same ruling. The objection will be sustained.

Mr. Crittenden: May I have the record show I am looking for a particular item appearing on the black book, the book of account.

* * * *—Tormey—(Tr. page 621)

Q. Now, if all the disbursements in the black book were added together, what more would you have to add to it to arrive at the sum of $15,971.07?

A. Now, you are restricting your question to the black book, and my answer is, I don't know.

Q. Did you get any data for the year 1942 other —I am referring to July 16 until the end of the year. Did you get any data outside of that black book, as items paid by cash? A. Yes.

Q. What were they?

A. Oh, items paid to Brady's Jewelry Company.

Q. In 1942 I am referring to.

A. Oh, no, I can't answer that question anyway, because I didn't make any effort to secure any outside payments other than the books, the checks and known records with her suppliers. We made contra audits, I mean audits of the contra accounts with all her liquor supplies and Lachman Bros. Furniture and everybody, we know she had done business with. And those, Mr. Hyman, those records were all that I made any endeavor to use. I realize she spends out large sums for her personal use and living expenses, but they did not enter into these calculations.

Q. I am trying to find out how I would arrive at this sum of total items if I used the evidence that is before this court in the black book, of the checks and the answer is I could not do it. Is that correct?

A. No, the answer is not that.

Mr. Campbell: Just a minute. I am going to object to that question because he limits it to certain exhibits, and then he says the evidence before this court. There is other evidence before this court which these men have testified to that they took into consideration. I suggest that the question is misleading for that reason.

The Court: The objection will be sustained.

* * * *—Tormey—(Tr. page 640)

Mr. Crittenden: I have a question or two. I want to state to the Court before I start in that I am greatly surprised in this: At the time we asked for a bill of particulars, particularly on September 2, 1947—

The Court: Just a moment. You proceed with this witness. I am not concerned with what you have in mind. This witness is on the stand. Examine this witness and proceed to do it now.

Redirect Examination

Mr. Crittenden: Q. Mr. Tormey, you say the ordinary audit requires external verification in addition to the books and records?

A. Wherever it is possible, yes.

Q. You go out and make an independent investigation?

A. It is left to the judgment of the investigating officers.

Q. You go out and make independent investigations?

A. Oh, yes, we check bank accounts, we check the accounts of vendors or wholesalers or department stores. That is customary procedure.

* * * *—Alberta Beall—(Tr. page 650)

Q. I point out Mr. Tormey sitting in the back section over there. Do you know him?

A. Yes, I have waited on him at one time.

Q. In 1946 can you give the date when you saw him, waited on him?

A. I can't give the date. I don't remember the date.

Q. The approximate time. Can you give me the month?

A. I don't know what month it was in. It was on Friday, Saturday or Sunday because those were the only three days I worked.

Q. Do you remember an evening when he came in the bar?

Mr. Campbell: Objected to as incompetent, irrellevant and immaterial and remote, and has nothing whatsoever to do with the issues of this case.

The Court: The objection is sustained.

Mr. Crittenden: Q. Referring to a time when he and the defendant met at the bar, do you remember an instance when that was?

Mr. Campbell: Just a minute. That is objected to as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Crittenden: Your Honor, I am seeking to go into the line of questioning I went into in the former testimony of this witness in the former trial of the case. If your Honor wants to rule on that, that that is not competent—

The Court: The Court has already ruled. The record is here. Proceed with this witness.

Mr. Crittenden: Q. Did you hear anything that Mr. Tormey said to the defendant that night when he came in the bar?

Mr. Campbell: Objected to as immaterial, irrelevant and incompetent.

The Court: The objection is sustained.

Mr. Crittenden: Q. What was the first thing Mr. Tormey said that night?

Mr. Campbell: Same objection.

The Court: Same ruling.

Mr. Crittenden: Q. Where did he sit?

A. Second—

Mr. Campbell: Same objection.

The Court: What was that?

A. He sat in the second booth.

* * * *—(Tr. page 652)

Mr. Campbell: I had interposed an objection at that point. I ask that the answer be stricken.

The Court: The objection is sustained. Let the answer go out. It will be disregarded.

Mr. Campbell: And I object on the ground it is incompetent and irrelevant.

Mr. Crittenden: Q. What, if anything, did Mr. Tormey say to you at that time?

Mr. Campbell: Same objection.

The Court: The objection is sustained.

Mr. Crittenden: Q. Did the defendant, Mrs. O'Connor, buy or order any drinks at that time?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

* * * *—(Tr. page 653)

Mr. Crittenden: Q. Which season? Was it spring, winter, summer or fall?

Mr. Campbell: I think that is immaterial. If the conversation took place in 1946, it is remote to any event that has been committed here.

The Court: I sustain the objection to this line of testimony.

Mr. Crittenden: If your Honor is ruling we can't go into that—

The Court: The Court has ruled. You have a record here sufficient for all purposes.

Mr. Crittenden: Q. Did Mr. Tormey make any statements at the time to which you are testifying?

Mr. Campbell: Objected to, if the Court please, and to further questions along this line, it having been demonstrated the conversation, if any, was in 1946.

The Court: The objection is sustained.

Mr. Crittenden: That is all.

* * * *—Tormey—(Tr. page 638)

Cross Examination

Mr. Campbell: Q. Mr. Tormey, on direct examination you stated that your audit was made in conformity with the general Bureau of Internal Revenue audit. What did you mean by that?

A. That is so far as possible we would substantiate all income and all expenses and allow such matters as are provided by law to be allowed.

* * * *—(Tr. page 646)

Mr. Crittenden: If your Honor please, I want it to appear that we made a motion for a bill of particulars and it has just come to my knowledge, despite the testimony of Mr. Siegel, Richard Siegel on September 2, 1947, on the motion for a bill of particulars, that the entire case was restricted to and was based upon the books of account of the defendant, the testimony now shows that not only was it not restricted to that but it is a general practice of the Intelligence Unit to go outside and make independent investigations, which if they believe is substantiated by proper evidence, they take and we do not and have not been able to determine or had before us for the preparation of this case any of this evidence which the Government has shown in their testimony, or at least the Government witness has shown in his testimony—we called him here—are matters not in the defendant's records or matters of independent investigation being used in the determination of these amounts. I will state

to your Honor it is a great surprise to me, and I have proceeded in this trial with the assumption that these computations were based solely upon the books of the defendant and the statements of the taxpayer and not upon additional investigations which we have no knowledge of, and I have asked to see these accounts of the Government, and I am sure if we go into that now, from the statement of this witness we would undoubtedly find where there is other or additional matter which is the result of this investigation to which has been testified.

Mr. Campbell: If the Court please, this is a rather late date for counsel to claim surprise after he has gone through the original case. As to his assertion, I was not present at the time he refers to when the request for a bill of particulars was made. However, this witness, for example, has testified his audit was based on these books and records and her statement of discrepancies, that he attempted to substantiate the matters made in her record and then submitted those things to her, where he thought there was a discrepancy between the books and records and she then signed the statement. We have been through all the evidence in this case. I have seen nothing which has taken counsel by surprise. He has indicated by his questions here that he is thoroughly familiar with the Government's case, and so I respectfully submit that the motion should be denied.

The Court: Denied.

* * * *—Mrs. O'Connor—(Tr. page 724)

Q. Now, did you have occasion to do any entertaining for various people or customers in the bar?

A. Yes, I always entertain. The only time I got a chance to entertain, because we were always working, was after we closed at night.

Mr. Campbell: If the Court please, I do not believe there is any issue as to entertainment. Mr. Krause stated that anything listed as entertainment in the book, he allowed in his schedule here.

Mr. Crittenden: I don't think that that is the fact, that they are all allowed. I think I have got to go in here and show the financial transaction. I have asked Mr. Campbell for the exact figures on these, which were allowed, and disallowed.

The Court: I have repeatedly instructed the jury to disregard any statements made by counsel on either side. It is not evidence and has no place in this case. Let us proceed with this case.

* * * *—Mrs. O'Connor—(Tr. page 755)

Q. When did you start paying her the $30 a week?

A. I gave her $30 a week when she was here. My sister helped me wonderfully in the club up there at 581.

Q. What did she do in the club? What were her duties?

A. She was all around. She spent 75 per cent of her time downstairs.

Q. What did she do downstairs?

A. She would make up things.

The Court: We are not concerned with what she did.

Mr. Crittenden: I want to show the services she performed.

The Court: If she performed services and got paid for them, we are concerned with what she was paid.

Mr. Crittenden: What did she do that she was paid this $30 for?

A. She made up syrups, she cleaned the back bar, she would help me at night.

The Court: What relation has that, the nature of her work?

Mr. Crittenden: There are a lot of expenses like, for instance, the traveling expenses of the sister—

Mr. Campbell: There is no issue of that, if the Court please. We have allowed the traveling expenses. We have allowed the sister's salary. We are going into matters on which there is no dispute.

Mr. Crittenden: Your Honor, I have no way of knowing that. I have asked for an opportunity to see those papers and it has been denied me consistently. I have seen them for just one recess on, I think, one day.

The Court: You only have to see it once.

Mr. Crittenden: I haven't had much time over it.

Mr. Campbell: During the course of the other trial, we spent two days with counsel going over these matters. Counsel has had a full right of cross examination not only of Mr. Krause, who made those, but he put Mr. Tormey on the stand, and went into a number of these items and determined whether they were allowed or not.

The Court: The court has not concluded the calendar. There are other matters on the calendar. I will excuse the jury at this time for a recess.

* * * *—Mrs. O'Connor—(Tr. page 761)

Q. The time you separated from your husband in July of 1943.

A. I just had the car, and I had my business.

Q. And you had some money in the bank?

A. And some money, whatever was in there, yes, sir.

Q. Did you owe some current bills at the time?

A. I always owe bills.

Q. Approximately how much did you owe at the time, will you state that?

Mr. Campbell: Objected to as immaterial.

The Court: Objection will be sustained.

Mr. Crittenden: I want to show that the allegations of the community property are—

The Court: The objection is sustained. Now you may proceed.

Mr. Crittenden: Q. When you filed your action for divorce, who did you employ for your counsel?

A. Mr. Hyman.

Q. Did you discuss the allegations of community property with him at the time?

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: Objection sustained.

Mr. Crittenden: Q. Mr. Hyman advised you as to the community property allegations in the divorce complaint?

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: The objection is sustained.

Mr. Crittenden: Q. Did Mr. Hyman advise you the effect of a default on any allegations in the complaint, or not?

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: The objection is sustained.

Mr. Crittenden: Q. Did Mr. Hyman advise you of the effect of alleging community property if there was default taken or a non-contested matter of this sort, this divorce?

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: The objection is sustained.

Mr. Crittenden: Q. Did Mr. Hyman advise you as to the effect of the allegations that there were community property in the divorce complaint if it were contested?

Mr. Campbell: The same objection, and I ask that the Court instruct counsel to desist from this line. The objections having been theretofore sustained.

The Court: The objection is sustained.

Mr. Crittenden: Do I understand from your Honor that I should not ask any further questions on this? If not, I am not going to waste time here.

The Court: The Court has ruled.

* * * *—Mrs. O'Connor—(Tr. page 811)

Q. Now, do you know Mr. Tormey sitting back there? A. Yes, I do.

Q. Referring to an evening about 9:30 or 10:00 o'clock—

Mr. Campbell: I can't hear you.

Mr. Crittenden: Q. Referring to an evening at 9:30 or 10:00 o'clock—

Mr. Campbell: May we have the year?

Mr. Crittenden: I am going to try to find that from her.

Q. Do you remember that he came to your bar about 9:30 or 10:00 o'clock one night?

A. Yes, it was in the spring. It was either in February or March of 1946.

Q. When was your attention first called to him?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Crittenden: Q. Did you have occasion to talk to him that evening?

Mr. Campbell: Objected to as immaterial.

The Court: 1946?

Mr. Campbell: Yes, your Honor, that is what she stated.

Mr. Crittenden: This is in the course of the investigation.

The Court: 1946? Objection sustained.

Mr. Crittenden: Q. What time did he leave that particular evening?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Crittenden: Q. What parties were present at the time he left?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Crittenden: What statements did he make to you at the time he left?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained. Now you have a record on that line of testimony.

Mr. Crittenden: Q. Now, could you give me the date when you came to the bar and found Mr. O'Connor and Mr. Tormey there?

Mr. Campbell: The date?

Mr. Crittenden: Just the date.

The Witness: The date?

Mr. Crittenden: Q. Yes.

A. It was after the first meeting, because my husband, Mr. O'Connor at the time was with me and that was the first time—

Mr. Campbell: Can we have the year, Mr. Crittenden?

Mr. Crittenden: Q. What was the approximate date, the year and month?

A. It was in 1945. Oh. I am not quite sure. It was after I met him. It had to be after we met him up there.

Q. November or December.

A. Oh, it was in the fall, I believe, of 1945. It was after we met Mr. Tormey. He was not on the first meeting. It was after I had gotten down to the new place and I didn't move there until September 1945, and that is when he was down at the bar in the afternoon.

Q. When you came up to him?

A. And we took him home.

Mr. Campbell: I ask that that last be stricken.

The Court: It may go out.

Mr. Crittenden: Q. At that time, what was

Mr. O'Connor and Mr. Tormey discussing when you came up there?

Mr. Campbell: Objected to as immaterial.

The Court: Objection is sustained.

Mr. Crittenden: Q. What, if anything, did you do after that?

Mr. Campbell: Same objection.

The Court: The objection is sustained.

Mr. Crittenden: Q. What was said subsequently after you left the bar by Mr. Tormey?

Mr. Campbell: Same objection.

The Court: Same ruling.

Mr. Crittenden: Q. What time did you leave Mr. Tormey that evening?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Crittenden: Q. Now, there was a subsequent time that you saw Mr. Tormey down at your bar after that, wasn't there? A. Yes, sir.

Q. What was the date of that?

A. He was there at night.

Q. No, I mean in the afternoon.

A. In the afternoon he called up for an apartment—

Mr. Campbell: I ask that that be stricken. She is asked for a date.

The Court: Let it go out and the jury will disregard it.

Mr. Crittenden: Q. I want to know the date of that incident.

A. It was three days after he was there at night, and that was in February or March of 1946. It

was within the week, because he asked me for an apartment that night.

Mr. Crittenden: No, just a moment.

Mr. Campbell: I ask that that again be stricken, if the Court please.

The Court: Let it go out and let the jury disregard it for any purpose in this case.

Mr. Crittenden: Q. At the time he came who was with him?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Crittenden: Q. What was said by the various parties, Mr. Tormey and the other person?

Mr. Campbell: Objected as immaterial and incompetent.

The Court: Objection sustained.

Mr. Crittenden: Q. How soon did they leave after they first came?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Mr. Crittenden: Q. And which way did they go?

Mr. Campbell: Objected to as immaterial.

The Court: You desist in your further examination of that character.

* * * *—Mrs. O'Connor—(Tr. page 819)

Q. And how did you have, how did you make the inventory, did you make these yourself?

Mr. Campbell: Objected to as immaterial.

The Court: The objection is sustained.

Mr. Crittenden: All right.

Q. Now, the bar and the bar fixtures, did you

use any of those after the time you moved when the license expired?

Mr. Campbell: Objected to as immaterial.

A. No, sir.

The Court: The objection is sustained.

* * * * —Mrs. O'Connor—(Tr. page 828)

Cross Examination

By Mr. Campbell:

Q. I ask you if those were your initials.

A. Those are my initials, but I didn't say it that way.

Mr. Crittenden: If your Honor please, I think we are wasting a lot of time. It wouldn't make one bit of difference if—

The Court: There is nothing before the court.

Mr. Campbell: Q. Now, Mrs. O'Connor—

Mr. Crittenden: I will object to any further discussion on this subject, because it wouldn't make any difference whether it was a gambling loss or not, it would be deductible.

The Court: Overruled. Proceed in this case.

* * * *—Mrs. O'Connor—(Tr. page 839)

Q. Five cases Y.P.M. whisky?

A. Yes, that is bar. That is old stock. The Schenley is all right.

Mr. Campbell: I will read this off if I may:

"15 cases Calvert's, 7 cases Rewco Rye, 6 cases Belle of Scotland Scotch, 2½ cases—

Just don't interrupt, Mrs. O'Connor, I will read this in a hurry. "2½ cases mixed call Scotch, 30 cases mixed rums, 15 cases S&J brandy, 15 cases

California brandy, 8 cases mixed vermouth, 5 cases mixed cocktails, 10 cases assorted gin, 2 cases sloe gin, 10 cases assorted wines, 1 case creme de menthe, five cases tequilla, 50 cases assorted beers, one case of vodka, 6 bottles Rock 'n Rye, 2 bottles, Cointreau, 1 bottle of creme de cacao, 6 bottles of cordials—2 apricot, 2 blackberry, 2 cherry—3 cases of champagne, pints."

That is all.

* * * *—(Tr. page 840)

Redirect Examination

Mr. Crittenden: Q. Reference has been made to YPM Whisky. What type of whisky is that?

A. It was whisky, but it was stuff that had been standing there and finally I gave it away. It was old stuff but I didn't even know—the bottles were all covered with cobwebs and things.

Q. Did you sell it to your customers at the bar?

A. I never opened it at all. It was on the premises and I just wrote it down there, or he wrote it down. I didn't make up that report.

Q. Rewco Rye? A. Rico Rye.

Mr. Campbell: I am going to object to the materiality of the quality of the whisky. The purchase price and the fact that she had it after having purchased it is the important thing, if the Court please. I object to the question.

The Court: The objection is sustained.

Mr. Crittenden: Q. Could you sell any of this brandy over the bar? A. No.

Mr. Campbell: That is objected to as immaterial.

The Court: The objection is sustained.

Mr. Crittenden: Q. Did you have calls for any of these cordials?

Mr. Campbell: Objected to as immaterial.

The Court: The objection is sustained.

DEFENDANT'S PROPOSED INSTRUCTIONS

Instruction No. 1

Rents from real property of a taxpayer, which are collected by a mortgagee under an assignment of the rents by the mortgagor to the mortgagee, and such rents are applied upon the debt secured by the mortgage, which debt is not a personal liability of the mortgagor enforceable in an action upon the debt, is not income taxable to the taxpayer mortgagor.

Hilpert v. Commissioner, 5 Cir. 151 F. 2d. 929.
Hadley Falls Trust Co. v. U.S., 22 Fed. Supp. 346.

Instruction No. 2

Under California Law, a purchase money mortgage for the purchase of real property is not an obligation between the mortgagor and the mortgagee upon which an action at law may be brought for the debt for personal liability of the mortgagor, and there is no deficiency judgment possible upon such a purchase money obligation, but the mortgagee may look to his security only and not to any legally enforceable obligation against the mortgagor.

Instruction No. 3

If you find from the evidence that the defendant owned income real property subject to a purchase money mortgage under the Laws of California, and the defendant assigned the rents and income of the said property to the mortgagee to collect such rents and income and apply the same upon the purchase money mortgage, and such mortgagee did collect such rents and income and apply the same upon the said mortgage obligations, you cannot consider any of such money so received and applied by the mortgagee, as income of the defendant for the purposes of income taxation.

Hilpert v. Comm'r., 5 Cir. 151 Fed. 2d. 929.
Hadley Falls Trust Co. vs. U.S., 22 F. Supp. 346.

CCP 580b.
Stockton Sav. & Loan Bank v. Massanet, 18 Cal. 2d. 200, 114 P2d. 592.

Instruction No. 4

In any proceeding before a court of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury to prove or disprove such genuineness.

28 USCA 638.

Instruction No. 5

On the "cash basis" of accounting, a taxpayer reports as income money when it is received irrespective of when it is otherwise due or earned, and expenses and disbursements are taken in the accounting period when paid irrespective of the date when the obligations, expense or disbursement was incurred, payable or due. Ordinarily inventories of a taxpayer are no part of the cash basis of accounting, but are under the "hybred" system of accounting. In the absence of a specific request of the Commissioner of Internal Revenue for a taxpayer to change to or adopt a specific system of accounting, the taxpayer is free to adopt and use any system of accounting that fairly and truly reflects his or her income. The law does not impose upon a taxpayer any specific or particular type of system of accounting not that the taxpayer keep his or her books in any particular manner, so long as it fairly represents his or her income.

The Tax Magazine (CCH) Dept. 47 Accounting Methods for Income Tax Purposes By Wm. Margalies, Page 816.

Instruction No. 6

Gross receipts of the defendant's business in any accounting period are not of themselves taxable income. It is taxable income that is the condition precedent the prosecution must prove by evidence beyond a reasonable doubt, for one cannot attempt to evade or defraud a tax one does not owe or that

is not raised and imposed by a Federal Statute. Gross receipts are but one item going to make up taxable income, for all business transactions are not profitable nor do they always result in taxable income.

Instruction No. 7

Honest or bona fide belief of the defendant at the time of making her tax returns involved in the indictment that certain items of income were not taxable income or mistaken concepts of law or of accounting or of taxation, however erroneous and however improbable, is a complete defense and negatives the specific wrongful intent required as an element of the offense of which the defendant stands charged. The offense requires a specific wrongful intent to defraud, that is actual knowledge of the existence of the obligations and duty and the wrongful intent to evade it.

Hargrove vs. U.S., 67 Fed. 2d. 820.

Instruction No. 8

Ordinarily one is presumed to know the law. However, under the offense of which defendant stands indicted, that presumption that one knows the law does not obtain. Under that offense a material element of the offense is that the defendant at the time she is alleged to have done the act knew the existence of the law and did an affirmative wrongful act knowing it was a violation of that specific law, and that the specific affirmative act so done is the act specified in the count of the indict-

ment. Thus ignorance of the law negatives the specific wrongful intent which is a necessary element of the offense. So also is lack of knowledge of the requirement to include taxable income, if any, not included in the return, sufficient to negative the specific wrongful intent which is a necessary element of the offense.

Hargrove v. U.S., 67 Fed. 2d. 820 5 Cir.

Instruction No. 9

A taxpayer is not guilty of a felony within the provisions of Section 145b because the taxpayer has a mistaken concept of what is or is not reportable income under the Income Tax Law, or because the taxpayer has a mistaken concept as to what is or is not an allowable deduction under the Income Tax Law, nor because the taxpayer has a mistaken concept of the Income Tax law, however erroneous and however improbable, nor because the taxpayer forgets certain income at the time of making and filing of the income tax return.

Hargrove v. U.S., 67 Fed. 2d. 520 5 Cir.

Instruction No. 10

The doctrine of respondeat superior, that an employer or master is responsible for the acts of his or her employee or servant has no application in the criminal law. One may be criminally liable only in case he does that which the law denounces. Criminal intent cannot be imputed to a person through an agent, without the principal's direct

participation. To be guilty of this intent there must be command, direction or consent by the principal to the doing of the very act.

People v. Armentrout, 118 Cal. App. 761 1 P2d. 556.

Paschen v. U.S., 70 Fed. 2d. 491.
Mobile v. U.S., 3 Cir. 284 Fed. 253.

Instruction No. 11

If you find from the evidence that the acts, if any, of an attempt to evade or defeat the personal income tax were acts of an accountant, agent, servant or employee of the defendant, you must return your verdict for the defendant, for she cannot be held criminally responsible for acts of her accountant, agent, servant or employee unless those acts were done by her positive command, direction or consent. This positive command, direction or consent of the defendant, if any, cannot be presumed, but must be proved by competent evidence adduced at the trial that strikes convictions in your mind beyond a reasonable doubt and to a moral certainty.

Instruction No. 12

A taxpayer is not criminally responsible for clerical errors of his or her employees, agents, servant or accountant in making a tax return.

Cooper v. U.S., 9 Fed. 2d. 216 8 Cir.

Instruction No. 13

One may be criminally liable only in case he or she does that which the law denounces. One is not liable criminally for acts of one's servants, employees, agents or account in which one does not command, direct or consent to such acts by one's positive acts with the intention of knowingly doing that which the law denounces, knowing at the time it is denounced by the law.

Instruction No. 14

You cannot find the defendant guilty of the offenses charged in the indictment if you find she only wilfully failed to make a return including all of her income, and wilfully failed to pay all the tax on that income.

Spies v. U.S., 317 U.S. 492, 87L.Ed. 418.

Instruction No. 16

Money or property received by a wife from her spouse or from the community property of the spouse upon a separation or divorce of the spouses is not income to the wife. This is true whether it be by express agreement or by judgment of the Court in awarding community property upon a divorce decree.

Instruction No. 17

Under the California Community Property Law, the respective interests of the husband and the wife in community property during the continu-

ance of the marriage relation are present, existing and equal interests under the management and control of the husband.

C.C.P. 161 a.

Instruction No. 18

The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided however, that he cannot make a gift of such community property or dispose of the same without a valuable consideration or sell, convey or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

C.C. 172.

Instruction No. 19

Earnings of a wife while living with her husband are community property.

Instruction No. 20

Earnings of the defendant while living with her husband from her services are community property and under the same absolute power of disposition, and the same management and control of the husband as any other community property. For the purposes of this case, the earnings of the defendant from her services in the business during the marriage and while she lived with her husband, are

not distinguishable in their management, control and disposition from earnings of the husband from his employment.

Instruction No. 21

Where separate property is used in a business of one of the spouses, and the principal part of the income is attributable to the personal service of one or both of the spouses, then the portion attributed to personal services are apportioned as a question of fact. Ordinarily 7% per annum would be income on the invested separate property and as such separate property, and the balance of the income of the business and personal services of the spouse would be community property. As an example and illustration, suppose a wife owned a business involving an investment of $1000 and the principal income was attributed to the services of the wife from the business, then 7% of the $1000 or $70.00 per year would be separate property of the wife, and all income of the business would be community property, over that $70.00 a year.

Lawrence Oliver v. Comm'r., 4 Tax Ct. 684.
Perira v. Perira, 156 Cal. 1, 103 P. 488.

Instruction No. 22

Where community and separate property have been mingled so as not to permit identity of the portion that is community and the portion that is separate, all of the property is presumed to be community property.

Roches v. Blair, 9 Cir. 32 F. 2, 222.

Instruction No. 23

Community property is taxable under the Income Tax law, one half to the husband and one half to the wife.

Instruction No. 24

Property acquired upon credit of the community property, as for example the earnings of the wife while living with her husband, is community property, even though such property is added to or used with separate property of the wife even though the original property to which it was added was originally the separate property of the wife.

Instruction No. 25

Money obtained by gambling in a friendly game, undertaken as a pastime or entertainment and not as a business, and which gambling is not prohibited by law is not taxable income.

McDermott v. Com., 150 F2 585.
Washburn v. Com., 5 T.C. No. 162.

Instruction No. 26

Although income from an unlawful business is taxable income, money obtained in a game of chance undertaken solely for amusement and not as a business is not taxable income.

McDermott v. Com., 150 F. 2d 585.
Washburn v. Com., 5 T.C. No. 162.

Instruction No. 27

Expenses of entertainment reasonably calculated to enhance business done in connection with one's business or occupation, are deductable expenses in arriving at taxable income.

Instruction No. 28

Living quarters or accommodations furnished an employee in one's business as part of the compensation of employment is a cost of doing business. The expenses of the employer in connection with such living quarters or accommodations are deductable from gross income in arriving at taxable income.

Instruction No. 29

Where property is used partly in the taxpayer's business and partly for other uses of the taxpayer, then the deductable costs and expenses of such property is in proportion that it is used in the business bears to its other use not attributable to the business. For example, if the taxpayer should use her automobile say for 6,000 miles in a taxable period in connection with her business and 4,000 miles in the same period for other purposes, 60% of the costs of the automobile operation would be attributable to the business and deductable from gross income to arrive at taxable income.

Instruction No. 30

Property used in the taxpayer's business, but not exhausted or worthless in the accounting per-

iod, is depreciable over its normally anticipated life under such use. You, the jury are the judge of such factual matters, and you are to apply your own judgment according to the evidence to such matters of depreciation and the rate thereof, and you are not bound by any suggested schedule or rates suggested by the government or any of their experts or witnesses.

Instruction No. 31

If you find from the evidence that the defendant employed an accountant, provided him with the books and records he requested, and relied in good faith upon the tax return prepared by the accountant, the requisite intent under Section 145 (b) is not present and your verdict must be for the defendant.

Instruction No. 32

The defendant is not charged with the offense of willful failure to pay a tax. That is another and different offense and is no part of the indictment in this case. Even though you should find the defendant willfully failed to pay a tax, however great, you cannot consider this in your deliberation upon the issues of this case.

Spies v. U. S. 317 U.S. 492, 87 L.Ed. 418, 63 S.Ct. 364.

Instruction No. 33

An affirmative willful attempt, as defined in these instructions, is a necessary element in the offense

of which the defendant stands charged. This element of the offense, an affirmative willful attempt, is never presumed. The burden of proving it, if any existed, is upon the prosecution. Unless you find from the evidence adduced at the trial the affirmative willful attempt of the defendant, if any, to do the specific acts charged in the indictment, beyond a reasonable doubt and to a moral certainty, you must return your verdict for the defendant.

Instruction No. 34

The difference between willful failure to pay a tax when due which is made a misdemeanor and is not part of the present case or present indictment, and willful attempt to defeat and evade a tax which is made a felony is not easy to detect or define. Both must be willful, and willful is a word of many meanings, often being influenced by its context. It may mean more applied to nonpayment of tax than when applied to failure to make a return, or making a false return. Mere voluntary and purposeful as distinguished from accidental omission might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we could not assume the mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. Willfulness in such a case includes some element of evil motive and want of justification in view of all the financial

circumstances of the taxpayer. The difference between the two offenses is found in the affirmative action implied from the term "attempt." The attempt made criminal by this statute 145(b) does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is completed and nothing more is added to its criminality by success or consummation, as say of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of any kind, and prosecution can only be for the attempt.

Willful but passive neglect of the statutory duty constitute the lesser offense of which the accused is not charged and is not involved in this proceedings; but to combine it with a willful and positive attempt to evade a tax in any manner or defeat it by any means lifts the offense to the degree of a felony.

By way of illustration and not limitation, we could think affirmative willful attempt may be inferred from conduct such as the keeping of a double set of books, making false entries, or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any conduct the likely effect of which would be to mislead or to conceal.

Spies v. U. S., 317 U. S. 492, 87 L. Ed. 418, 63 S. Ct. 364.

Instruction No. 35

"Willful" as used in the defining of the offense of which the defendant stands charged, is a word of many meanings. This word "willful" means not only "intentional" "knowing", or "voluntary", and in addition to the other things covered in other instructions, the word "willful" means an act done with a bad purpose and a thing done without grounds for believing it lawful, and includes as part of its definition evil motive.

U. S. v. Murdock, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381.

Instruction No. 36

"Willful and knowing" as used in the definition of the offense charged in the indictment, includes not only the definitions covered in other portions of these instructions, but it also includes a specific intent to defraud, and a mere willful doing of the acts charged in the indictment is not enough. It requires a specific wrongful intent, that is actual knowledge of the existence of the obligations imposed by law upon a taxpayer to make and include the specific matters alleged to have been omitted from the returns, and the specific wrongful intent to evade it that is the essence of the offense charged.

Hargrove v. U. S., 67 Fed. 2d. 820.

* * * *

Instruction No. 38

Unless you find from the evidence adduced at the trial, beyond a reasonable doubt and to a moral certainty, that the defendant did each and every thing charged in the indictment with actual specific knowledge that such affirmative acts, if any, were done with actual knowledge that such affirmative acts were then known by her to be a specific violation of the tax law of which she stands charged you must return your verdict for the defendant.

Hargrove v. U. S., 67 Fed. 2d, 820 5 Cir.

Instruction No. 39

Specific intent to defraud is a necessary element of the offense charged in the indictment. Fraud is never presumed, but the burden of proving it is always upon the prosecution. Each and every element of the intent to defraud must be proved by evidence adduced at the trial, to a moral certainty and beyond a reasonable doubt.

Instruction No. 40

"Fraud" is a legal term having a specific meaning at law separate and apart from its meaning in common parlance. It involves a number of necessary elements, all of which must concur to constitute "fraud" in its legal sense. "Fraud" as used in its legal sense involves a material representation (2) that the material representation is false (3) scienter, that is knowledge by the person making the material false representation that such representa-

tion was false (4) intent that the person to whom the false material representation was made should act upon it in the manner reasonably contemplated (5) that the person to whom the false material representation was made was ignorant of the falsity (6) that the person to whom the false material representation was made relied upon the truth of the said representation (7) that such person relying thereon had a right to rely thereon in the exercise of due diligence under the circumstances (8) that there was injury or damage the consequent and proximate cause of such acts and reliance. No part of fraud as the term is used in the law is ever presumed, but must be proved by competent evidence adduced at the trial that strikes conviction in the minds of the jury beyond a reasonable doubt and to a moral certainty. Failure to prove each and every element of the fraud by such evidence must result in a finding by the jury that there was no fraud.

26 C. A. 1062.

* * * *

Instruction No. 42

If you find from the evidence that the defendant discovered after she made and filed any of the returns involved in this case that any income had been omitted therefrom or that such return was incorrect in any manner, you cannot consider such omission or incorrect statement or discovery or the failure to discover in your deliberations, for

none of these are any element of the offense of which the defendant stands charged.

Guzik v. U. S., 54 F. 2d., 618 cert. den. 285 U. S. 545.

Instruction No. 43

You must find from the evidence adduced at the trial, beyond a reasonable doubt and to a moral certainty, that the defendant owed, and the Federal Statutes raised and imposed a tax charged in the indictment counts for there to be an offense, even if all of the other elements of the offense are found from the evidence beyond a reasonable doubt and to a moral certainty to be present. No one can attempt to evade and defraud a tax which is not raised and imposed by the Federal Statute and owed by him or her. Defendant's liability for the said taxes, if any, is a condition precedent to a commission of the offense charged in the indictment. The defendant's liability for the said taxes, if any, is not the essence of the offense, except as one of the necessary elements which the prosecution must prove by evidence adduced at the trial beyond a reasonable doubt and to a moral certainty.

Instruction No. 44

In determining whether the defendant is liable for the tax, if any, alleged in the indictment, which is a condition precedent to alleged offense, for one cannot attempt to evade and defraud a tax one does not owe; you must consider only the evidence

adduced at the trial and properly admitted by the Court. Arguments of counsel are no part of this proof. No part of the alleged liability is presumed. The burden of proving not only the gross income of the defendant, if any, during the periods of time covered in the indictment, but also all proper deductions to arrive at the proper tax liability, if any, is upon the prosecution. No part of the burden of proof of any of the elements necessary to prove proper tax liability if any, is upon the defendant. This burden of proof never shifts. The quantum of proof of this alleged tax liability of the defendant is not that of civil cases which is a mere preponderance, nor does the determination by any governmental agency raise any presumption as in matters before the Internal Revenue Department or in civil litigation, but each and every element to make up the alleged liability of the defendant must be proved with the same quantum of proof as other elements in a criminal case, which the prosecution must prove.

Instruction No. 45

In making and filing an income tax return a taxpayer need only report such income as he or she believes is taxable income and the taxpayer may take all deductions in such return as he or she may believe proper. In doing so, the taxpayer is not acting at his or her peril of prosecution under Section 145(b), if the law or the Internal Revenue Bureau should determine there was other income reportable or taxable, or some or all of

the deductions claimed by the taxpayer are not proper. The reported decisions of the United States Courts are full of reported judicial decisions where the taxpayer and the Bureau of Internal Revenue differed as to what was or what was not taxable income and as to what was and what was not proper deductions. The United States Courts, can and on some occasions do, construe the tax laws differently than the Bureau of Internal Revenue has by its published regulations. On the other hand, the Bureau of Internal Revenue does not always acquiesce in the decisions of the United States Courts even when final; and the Bureau continues to apply the tax laws without regard to the judicial decisions in which it does not acquiesce. Congress has provided for determination of such disputes by an adequate system of procedure, including assessments and judicial reviews in such civil matters. Whether or not there has been any assessment or civil proceedings between the taxpayer and the Bureau of Internal Revenue, is no issue in this criminal trial. The outcome of this criminal proceedings in no way effects nor concerns such civil liability, if any, or the assessment or collection of any tax, if any, of the defendant.

Instruction No. 46

When a taxpayer entertains a doubt as to what income or money is reportable or what items are deductible expenses, the taxpayer in making and filing his or her return is free to resolve all such doubts in his or her favor. This is true even though

there may be some regulation of the Bureau of Internal Revenue which the taxpayer may believe is not in accord with a law of Congress or of the United States Constitution. This is true even though the taxpayer is ignorant of some law or judicial decision among the reported cases. It is not the intention of Congress to punish as a felony under Section 145(b), any such acts of a taxpayer.

Instruction No. 47

The applicable statutes provide that losses incurred in trade or business or losses incurred in transactions entered into for profit, though not connected with trade or business, and losses of property not connected with trade or business arising from casualty or theft are deductible from gross income.

1945 Master Tax Guide U. S., see 306 Code Section 23(e).

Instruction No. 48

The applicable statutes specifically designate bad debts as deductions in computing net income.

1945 Master Guide U. S., see Code Section 23(k).

Instruction No. 49

In lieu of the deduction for specific debts actually worthless, there may be deducted a reasonable reserve for bad debts, at the option of the taxpayer.

Reg. Sec. 29.23(k)—1 (2).

Instruction No. 50

The Defendant in filing a joint return with her husband in 1942 did not thereby lose any of her rights or her identity as an individual separate taxpayer for that accounting period.

Cole v. Connors', 9 Cir. 81 F. 2, 485.

Instruction No. 51

You are not to take into your consideration, in deliberation upon the evidence as to income of the defendant for the year 1942, any income of her then husband, Mr. Jost. The filing of a joint return imposes joint liability only as to the amount of tax, if any, shown due by the joint return. The filing of a joint return does not surrender the spouses' individuality as a separate taxpayer; but the duty is upon the prosecution to prove beyond a reasonable doubt the defendant's individual tax liability, if any, from competent evidence adduced and admitted at the trial. No part of the defendant's husband's vested interest in one half of the community property is income of the defendant.

Cole v. Connors', 9 Cir. 81 F. 2, 485.

Instruction No. 52

You are instructed that under the first count of the indictment, the Defendant is charged solely with attempting to defeat and evade income tax for the calendar year, 1942. As to the year 1942 if you find that the tax imposed upon the defendant for the taxable year 1942 was not greater than the

tax for the taxable year 1943 and you further find that the Defendant has not been convicted of any criminal offense with respect to the tax for the taxable year 1942 and that no tax assessment has been made by the United States Treasury Department against the defendant for the taxable year 1942, then I instruct you that it is the law that the liability of the defendant for the tax imposed for the taxable year 1942 was discharged on September 1, 1943.

Sec. 6, Current Tax Payment Act of 1943.

Instruction No. 53

You are instructed that the Current Tax Payment Act of 1943 placed the Defendant upon a current basis for taxable years beginning after December 31, 1942 and relieved the Defendant from paying two years tax liabilities in one year. The general effect of this provision was to cut down the amount of tax liability otherwise payable by the defendant 100% of the tax liability for the lower of the years 1942 or 1943. Thus if you find the tax liability of the defendant for the taxable year 1942 to be lower than the tax liability for the taxable year 1943, then the entire tax liability for the taxable year 1942 is discharged as of September 1, 1943, but the tax imposed by the Internal Revenue Code for the taxable year beginning in 1943 is increased.

Sec. 6, Current Tax Payment Act of 1943.

Instruction No. 54

As to the divorce action between the defendant and William B. Jost, the jury is instructed that if they find that the defendant, (Catherine O'Connor), obtained the decree of divorce therein by default of the defendant, William B. Jost, then it is the law of the State of California that such judgment becomes in effect a contract between the parties thereto; then any community property not disposed of in such judgment of divorce continued after the judgment to be held by the parties as tenants in common.

Brown v. Brown, 170 Cal. 1, 174 Pac. 1168.
Loraine v. Loraine, 8 Cal. App. (2) 687 48 Pac. (2) 48.

Instruction No. 55

The jury is instructed that if they find that in the divorce action between the defendant and William B. Jost there was never an award of any community property to either spouse in either the interlocutory or final decree then if there were any community property in existence at the date of the final decree of divorce, such property remained the property of both spouses thereafter and they continued to hold the same as tenants in common after the date of the final decree of divorce therein.

Brown v. Brown, 170 Cal. 1, 174 Pac. 1168.
Loraine v. Loraine, 8 Cal. App. (2) 687, 48 Pac. (2) 48.

Instruction No. 56

The jury is instructed that if they find that in the divorce action against William B. Jost that the Plaintiff in her complaint claimed all of the property of the parties as her own, and that the plaintiff further thereafter obtained a default judgment of divorce against William B. Jost, then the jury is instructed that it is the law in the State of California that such judgment became in effect a contract between the parties thereto whereunder all community property interest of the defendant, William B. Jost, passed to the plaintiff as her sole and separate property.

Brown v. Brown, 170 Cal. 1, 174 Pac. 1168.
Loraine v. Loraine, 8 Cal. App (2) 687 48 Pac. (2) 48.

Instruction No. 57

The presumption that all criminal acts of a wife are done in the presence of the husband by his coercion arises even if the wife at the time of such acts is not within the view of her husband. It is sufficient that she is in the same proximity as her husband, that is, in the same building.

30 C. J., 792.

Instruction No. 58

If you find that any of the elements of the offense charged in the indictment were done by the defendant in the presence of her spouse, you must

presume such acts or omissions were done at the coercion of the husband.

30 C. J., 792.

Instruction No. 59

The presumption that all criminal acts of a wife done in the presence of her husband are done under his coercion is a species of evidence that persists throughout the trial and during your deliberation unless and until overcome by positive evidence, if any, adduced at the trial that strikes conviction in your minds beyond a reasonable doubt and to a moral certainty to the contrary.

30 C. J., 792.

Instruction No. 60

All criminal acts of a wife done in the presence of her husband are presumed to be done at the coercion of her husband, and she cannot be held criminally for acts done by coercion and not by her criminal intent.

30 C. J., 791.

Instruction No. 61

You are directed to return your verdict of not guilty upon the first count of the indictment (covering the taxable year 1942).

Instruction No. 62

You are directed to return your verdict of not guilty upon the second count of the indictment (taxable year 1943).

Instruction No. 63

You are directed to return your verdict of not guilty upon the third count of the indictment (taxable year 1944).

Tuesday, April 6, 1948
10:00 o'clock a.m.

(After the cause was argued by respective counsel, and at the conclusion thereof, the Court charged the jury as follows:)

The Court: It now becomes the duty of the Court to instruct the jury on the law of this case, and it becomes the duty of the jury to apply the law thus given to them to the facts before them; the jury are the sole judges of the facts.

It is the duty of the jury to give uniform consideration to all of the instructions herein given, to consider the whole and every part thereof together and to accept such instructions as a correct statement of the law involved.

The defendant in this case is charged with a violation of a certain federal law which has to do with the payment of income tax to the United States. It is known as Section 145(b) of the Internal Revenue Code. Among other things it provides that any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment therefor, shall, in addition to other penalties provided by law, be guilty of a felony, and upon conviction therefor shall be punished as the statute provides.

The defendant in this case, accordingly, has been charged with a violation of that particular law. The indictment is in three counts; that is, there are three separate charges, the first of which charges the violation of this law, in that the defendant in 1943 wilfully attempted to defeat and evade a large part of income tax owing by her to the United States for the year 1942 by filing and causing to be filed a false and fraudulent income tax return, whereas it is charged in this indictment she incorrectly stated and falsely stated her net income for the year 1942, stating it to be substantially less than as the indictment charges it was. A similar offense is charged in the second count of the indictment for the calendar year 1943, and a similar offense is charged in the third count of the indictment for the calendar year 1944. Therefore the jury has three separate problems to consider; whether there was a violation of the statute for the defendant in the calendar year 1942, and also for the year 1943, and also for the year 1944.

There are a few matters of law that pertain to the criminal liability under this statute, which I will give you as simply and concisely as I can. The gravamen—that is, the gist of the law—is that if a taxpayer does some affirmative act wilfully in an attempt to evade or avoid an income tax imposed, or the collection thereof, he is guilty of a felony. There must be upon the part of the taxpayer, in order that he may be convicted or found guilty, a wilful affirmative act or acts of some kind whose purpose it is to avoid or defeat the tax itself or

the collection of the tax. Even the filing of an incorrect or false income tax return of itself is not a felony unless it may be said that you may find that it be a conscious, wilful, affirmative act performed by the defendant for the purpose of either evading the tax itself, or evading the payment of it. The offense with which the defendant is charged in this case requires a specific wrongful attempt to defeat the United States in the collection or imposition of the tax. There must be on the part of the defendant actual knowledge of the existence of her obligation to pay this tax, and to report it, and a wrongful attempt to avoid that duty and responsibility.

The fact that an indictment has been filed against the defendant is not to be considered by you as any evidence of the defendant's guilt. The indictment is merely a legal accusation charging a defendant with the commission of a crime. It is not, however, evidence any such defendant and does not create any presumption or inference of the defendant's guilt, and you are not to consider such fact in arriving at your verdict.

The federal government levies a tax on the net income of every individual. The applicable statutes define "net income" as gross income less deductions authorized by law.

"Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, also professions, vocations, trades, businesses, commerce or sales or dealings in property, whether real or personal, growing out of the

ownership, or use of, or interest in, such property; also from interest, rentals, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The applicable statutes provide that the following expenses are deductible from gross income in order to compute net income for income tax purposes:

1. The ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business; such ordinary and necessary expenses may include reasonable expenses of entertainment necessarily done in connection with one's business or occupation for the purpose of enhancing the value of the business;

2. Interest paid or incurred during the taxable year on indebtedness;

3. Taxes paid or incurred during the taxable year except Federal income taxes;

4. Depreciation—defined as a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, or of property held for the production of income;

5. Charitable contributions—which means contributions made by the taxpayer to a charitable organization for its use in carrying out its purposes.

In 1944, the applicable statutes allowed the taxpayer to deduct $500 if her gross income less business expenses was over $5,000, instead of deducting charitable contributions, interest and other non-business expenses.

You have been instructed that ordinary and necessary business expenditures are deductible from gross income. You should understand, however, that all business expenditures are not deductible, even though they be ordinary and necessary.

Those business expenditures which are made for the purchase of what is known as "capital assets" are not deductible. Specifically, if the expenditure is for the purchase of something which is not ordinarily used up in a year, it is not deductible. For example, an expenditure for the purchase of furniture for a rooming house or a bar is not deductible as an ordinary or necessary business expense; while money spent to purchase whiskey or food to be sold at a bar is so deductible.

You are instructed that gifts to individuals, however needy or deserving they may be, are not deductible as charitable contributions. Only contributions to an organized charity, such as the Red Cross, are deductible in computing income taxes.

Before the income tax on net income is computed, the applicable statutes allow certain "personal exemptions" to be deducted, depending on the marital status of the taxpayer.

For 1942 the statutes allowed a taxpayer who was married and living with his or her husband or wife a personal exemption of $1,200. Only one such exemption was allowed for each couple living together. If a joint return was filed by the husband and the wife, the whole exemption could be taken on that return.

For 1943 the statutes allowed a personal exemp-

tion in the same amount. If the spouses were living together for part of the year, the taxpayer was entitled to deduct only that proportional part of the exemption for married taxpayers. The statutes also allowed a personal exemption of $1,200 for a taxpayer who was not married, or married and not living with her husband or wife, if he or she was the head of a family.

For 1944 the applicable statutes allowed a personal exemption of $500 to be deducted by each taxpayer who was not married and not the head of a family, or married but not living with his or her husband or wife.

You are instructed that the earnings of the defendant while she was living apart from her husband, William Jost, were her separate income and were not in any way community income, or income to William Jost, either before or after the commencement or termination of divorce proceedings.

The Government has offered proof that defendant owned a half interest in the bar known as Kay's Club before she married William Jost, that she purchased the other half interest with money she borrowed, that no assets of William Jost's were vested in Kay's Club, and that defendant was the sole proprietor and manager of Kay's Club. The Government has also offered proof that William Jost laid no claim to any part of the income from Kay's Club, and that defendant purported to report all the income from Kay's Club on her separate income tax returns for 1943 and 1944, and that defendant stated, under oath, that there was no community property between herself and William Jost.

If you believe the Government's evidence, you may find from these facts that William Jost relinquished any claim he might have had to defendant's earnings from Kay's Club, or any claim that the income from Kay's Club was community income. You are instructed that such relinquishment by William Jost had the effect of making the income from Kay's Club the separate income of defendant.

The defendant is charged with having violated the Internal Revenue laws by having wilfully attempted to evade and defeat part of the income taxes due from her with respect to 1942, 1943 and 1944. To prove this charge for any year, the Government must prove, together with other elements which I will define later, that the defendant did some act in that year which tended to conceal her true tax liability from the Government.

It is the law that any act, of whatever kind, which tends to evade taxes is enough to make up this crime. Among the acts which are sufficient in making the Government's case are: keeping false books, filing false returns, destruction of books and records, and the concealment of assets. This list is not complete, but is merely a list of examples of the kind of acts which Congress intended to punish.

The Government must not only prove that defendant did some act which tended to conceal her true tax liability, but must also prove that this act was done wilfully.

"Wilful" in the statute which makes a wilful attempt to evade taxes a crime, refers to the state of

mind in which the act of evasion was done. It includes several states of mind, any one of which may be the wilfulness necessary to make up the crime. Wilfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful, and it also includes doing an act with careless disregard or whether or not one has the right to so act.

You are instructed that it is not necessary for the Government to offer direct proof of wilfulness. It is a rare case in which the defendant has said to a witness that he did certain acts with the purpose of evading his tax liabilities.

In making your decision, therefore, as to whether or not the acts tending to conceal defendant's true tax liability are wilful, you may consider all the circumstances of the case. You may infer wilfulness from any kind of evasion, if any, which you find defendant committed, from her opportunity to know the true amount of her net income and from such other facts which point to the existence or nonexistence of the criminal state of mind in the defendant.

The Government has offered proof in this case that defendant was the sole proprietor of Kay's Club, and was the person who managed and directed its affairs. You are instructed that you may infer from this fact that defendant knew the true amount of gross income which was taken in by Kay's Club.

Besides proving the commission of acts tending

to conceal defendant's true tax liability and proving that these acts were wilfully done by defendant, the Government must also prove that defendant owed more income tax than she reported as due.

The indictment alleges that defendant owed a certain amount of tax and reported as due a smaller amount in each of the three years with which this trial was concerned. The Government, however, need not prove that defendant owed the exact amount of tax alleged in the indictment. It is sufficient proof of the Government's case as to any year if you find that the defendant owed any substantial amount of tax for that year in addition to the amount reported as due.

As part of the proof of its case, the Government has offered evidence that defendant had more gross income and net income in each year than she reported on her returns for that year. As proof of the true amount of the defendant's gross and net income, the Government has offered evidence that defendant deposited certain amounts of money in her bank accounts in each year, and that she spent certain other amounts of money which, if you believe the Government's evidence, were not deposited in any bank, and so are not counted in totalling up her bank deposits.

You are instructed that proof that a person has a business from which she derives income, together with proof that that person makes frequent deposits to a bank account, and proof that she draws on that bank account for her own use, is potent proof that deposits to her bank account made in any

year are made from her gross income earned in that year.

You are further instructed that proof that a person who had such a source of income spent a certain amount of money in a particular year is proof that that money came from the person's gross income for that year.

Ordinarily one is presumed to know the law. However, with respect to the crime with which this defendant is charged, namely, wilfully attempting to evade and defeat her income tax liability by filing a false return, you are instructed you may not find her guilty on any of the three counts unless you find that she knew that the law required her to file true and correct income tax returns.

If you find from the evidence that the defendant employed an accountant, provided him with truthful books and records and fully disclosed to him all her gross income and her true deductible expenditures, and if you further find that having done all of this, she relied on good faith on his advise, you are instructed that the wilfulness which is a requisite of this offense is not present here.

You are instructed that where a husband and wife file a joint return, and where later a deficiency in tax is asserted, the spouse on whose additional income the deficiency is asserted is liable for the deficiency in tax. Thus if you find in this case that the income or any part of it which was not reported in 1942 was the income of the defendant, you are instructed that she is severally liable for the income tax on that unreported income.

You are instructed that if you believe the defendant wilfully attempted to evade and defeat a substantial part of her 1942 tax liability by filing a false return for that year, you should find her guilty on the first count, despite the forgiveness features of the applicable tax statutes, since the tax law forgave taxes for 1942 or 1943 only where there was no fraud only on the part of the taxpayer in reporting them.

Gifts from whatever source, even from a husband, are no part of income chargeable to the donee of the gift. Gifts are taxable under a separate statute and their returns and taxation are no concern of the jury or of the issues of this case.

The specific wrongful intent with actual knowledge of the act being a violation of the statutory duty of the taxpayer that is an essential element of the offense charged is never presumed. The burden of proving it is always upon the prosecution. This element of offense must be proved by evidence adduced at the trial that strikes conviction in your mind beyond a reasonable doubt and to a moral certainty.

The defendant stands charged with only the offenses set forth in the various counts of the indictment. She is not charged with any other offense or offenses. Unless each and every element of the offense charged is proved by competent evidence adduced at the trial beyond a reasonable doubt and to a moral certainty, you must return your verdict of acquittal. Even if the evidence should justify your finding that the defendant has committed some

other offense, you are to wholly disregard such other offense in arriving at your verdict.

The applicable statutes specifically designate bad debts as deductions in computing net income.

There has been some mention in the testimony of income of the defendant from gambling. In so far as that may be material to a determination of a specific issue as to whether or not there was, during the three years in question, a wilful and fraudulent attempt by the defendant to evade the payment or the imposition of an income tax by the United States, let me say that the tax statute makes no difference between income obtained from illegal or from legal activities. All sorts of income are taxable in the same manner. Net income from gambling is taxable like any other income. As far as the collection of taxes is concerned, the Government is not interested in how or where a man earns money. It is only interested in his paying a tax on that which represents his net earnings.

The determination of a charge in a criminal case involves the proof of two distinct propositions: first, that the crime charged was committed; and second, that it was committed by the person accused thereof and on trial therefor. These two propositions and every essential and material fact necessary to them or to either of them must be established by the Government to a moral certainty and beyond a reasonable doubt.

Every person charged with crime is presumed to be innocent, and this presumption has the effect of evidence and continues to operate on his behalf

until it is overcome by competent evidence. It is not necessary for the defendant to prove her innocence; the burden rests upon the prosecution to establish every element of the crime charged, to a moral certainty and beyond a reasonable doubt.

A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eyewitness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the

crime by a defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit it—in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime.

Circumstantial evidence includes any fact which may tend to prove the issues presented, and may consist of any act, circumstances or declaration admitted in evidence and tending to connect the defendant with the commission of the crime charged. In order to convict, the circumstances must be such as to produce the same degree of certainty as direct evidence. There is nothing in the nature of circumstantial evidence which renders it any less reliable than any other class of evidence; if it produces in the minds of the jury a conclusion of the defendant's guilt beyond all reasonable doubt, it is sufficient.

If, upon consideration of the whole cause, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

In every crime there must exist a union or joint operation of act and intent; and for a conviction, both elements must be proven to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such acts. It does not also require a knowledge that such act is a violation of law.

However, a person must be presumed to intend to do that which he voluntarily or wilfully does in fact do, and must also be presumed to intend all the natural, probably and usual consequences of his own acts.

The Court further instructs the jury that the intent or intention with which an act is done is manifest by the circumstances connected with the offense and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity.

You, the jury, are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. The witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or his motives; or by contradicting evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the part of it as may be dictated by your judgment as reasonable jurors.

You should carefully scrutinize the testimony given, and in so doing, consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars and in that case you are at liberty to reject the whole of the witness' testimony.

In determining the credibility of a witness, you should consider whether the testimony of any witness is in itself contradictory, whether it has been contradicted by other credible witnesses, whether the statement made by any witnesses are reasonable or unreasonable, whether they are consistent with other statements or with the facts established by other evidence or admitted facts.

You may also consider the witness' manner of testifying on examination, the character of the testimony, the bias or prejudice, if any, manifested, the interest or absence of interest in the case, their degree of intelligence, their recollection—whether good or bad, clear or indistinct, concerning the facts testified to, the inclination or motives together with the opportunity of the witness knowing the facts whereof he may speak.

A witness may be impeached by the party against whom he was called by contradictory evidence, by evidence that he has made at other times statements

inconsistent with his present testimony. If you find that any witness has been impeached or that the presumption of truthfulness attached to the testimony of such witness has been repelled, then you will give the testimony of such witness such credibility, if any, as you may consider it entitled to. Where a showing of inconsistent statements by way of impeachment is allowed and made, you as jurors nevertheless remain the exclusive judges of the credibility of all the witnesses, and are just as much entitled to believe the witness whose statements are impeached as the witness who impeached.

You have been confronted with what the law calls "expert testimony." The difference between ordinary and expert testimony is as follows:

Ordinarily a witness is allowed to testify only as to facts which he has seen or observed. An exception to this rule occurs in the case of a so-called "expert witness", who is allowed to give his opinion in any matter pertaining to a science, art or trade in which he is skilled. The amount of skill, training or study devoted by the particular expert to the field in which he gives his opinion goes to the weight of his evidence and must be determined by you.

If you should find that a particular expert witness possesses the necessary background, training and experience in the subject matter involved in his discussion, then you shall consider his opinion as a matter of evidence which shall be treated in the same light as any facts testified to in the case.

Duly qualified experts have given their opinions

on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. You are bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if he or she does so, her credibility and the value and effect of her evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness to be determined. If a defendant elects to take the stand and testify in her own behalf, her testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses as given you in another part of the instructions are to be applied to her testimony alike with that of all other witnesses. No greater or lesser presumption attaches in favor of her testimony than attaches to that of any other witness—with this additional feature, however: that you should weigh the defendant's testimony in the light of the fact that she is the defendant in the case, and that she has an interest in the outcome of the case because of that fact.

The Court cautions you to distinguish carefully

between the facts testified to by the witnesses and the statements made by the attorneys in their arguments, or presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict—to the extent that there is such variance—consider only the facts testified to by the witnesses. And you are to remember that statements of counsel in their arguments or presentations are not evidence in the case. If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence and must look entirely to the proof in ascertaining what the facts are.

If counsel, however, have stipulated or agreed to certain facts, you are to regard the facts so stipulated to as being conclusively proven.

The court charges you that evidence admitted for a limited purpose is to be considered by the jury for such purpose, and none other. Under this rule it is the duty of the jury, when the propositions are facts to which such evidence is addressed and determined, to exclude such evidence in its consideration of all other matters of fact in the case.

It sometimes happens during the trial of the case that objections are made to questions asked or to offers made to prove certain facts, which objections are sustained by the Court; and it sometimes happens that evidence given by a witness is stricken out by the Court on motion. In any of such cases, you are instructed that in arriving at a verdict you

are not to consider as evidence anything that has been stricken out by the Court or anything offered to be proven or contained in any question to which an objection has been sustained by the Court.

If counsel on either side, or the Court, during the pendency of this proceeding, made any statement outside of the record—that is, a statement which was not pertinent or relative or material to the issues involved in this case, or if the Court in discussing with counsel any objection or motion made any statement which seemed to you to reflect upon counsel or seemed to you to indicate that the Court had some opinion upon the merits of the case or upon some fact or issues involved in the case, then the Court admonishes you to disregard any such statement, if such statement was made, in reaching a verdict in this case.

If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness or between the testimony of any witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies, or such points of difference, affect the true issues in this case. Examine such discrepancies or inconsistencies and such disputed points; look at the same squarely and ask yourselves these questions: How does the decision of this or that or the other discrepancy or matter in dispute affect the guilt or innocence of the defendant? Regardless of what may be the truth concerning such discrepancies or inconsistencies,

ask yourselves the main question: Did or did not the defendant commit the crime as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main or material issue of fact as to the guilt or innocence of the defendant? If they are not material, if the decision of the same is not necessary to enable you to arrive at the truth of the guilt or innocence of the defendant, then such discrepancies or disputed points are immaterial and minor matters, and do not waste any further time discussing or considering them. Spend no time in the discussion of minor matters which, whether true or false, do not affect and are not necessary to enable you to answer the important question: Did the defendant do those things set forth in the allegations of the indictment?

Although as men and women, you may sympathize with those who suffer, yet as honest men and women, bound by oath to administer judgment according to law and evidence, you should not act upon your sympathies without any proof. Mercy does not belong to you. No question of mercy, sentiment or anything else resides in you, except the question of whether or not you believe, from the evidence, and beyond a reasonable doubt, that the defendant is guilty. You should return your verdict accordingly.

If you are aware of the penalty prescribed by law, it is your duty to disregard that knowledge. In other words, your sole duty is to decide whether the defendant is guilty or not guilty of what she is

charged with. The question of punishment is left wholly to the Court, except as the law circumscribes its power.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which jurors given their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that a defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains, the Government is entitled to a verdict.

In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account in this case.

The verdict of the jury should represent the opinion of each individual juror; it by no means follows that the opinions may not be changed in the juryroom. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves.

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to consult with one another in a juryroom, and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

Your verdict must be unanimous.

When you retire to your juryroom to deliberate, you must select one of your number as foreman, and he will sign your verdict for you when it has been agreed upon, and he will represent you as spokesman in the further conduct of this case in this court.

The Clerk has prepared a form of verdict for you; you will take it to the juryroom with you. The form of the verdict is made out in blank and reads as follows:

"We, the jury, find the defendant at the bar as follows: ..... as to the first count, ... as to the second count, and ..... as to the third count."

When you have agreed upon this verdict, you will fill in those three blanks and you will have your foreman sign it and return it into court.

I think that covers all of the matters. The jury will now retire and deliberate upon their verdict.